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REPORTS OF CASES

IN THE

SUPREME COURT OF NEBRASKA.

SEPTEMBER TERM, 1911—JANUARY TERM, 1912.

VOLUME XC.

HARRY C. LINDSAY,

OFFICIAL REPORTER.

o

PREPARED AND EDITED BY

HENRY P. STODDART,

DEPUTY REPORTER.

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For the benefit of the State of Nebraska.

MAY 21 1912

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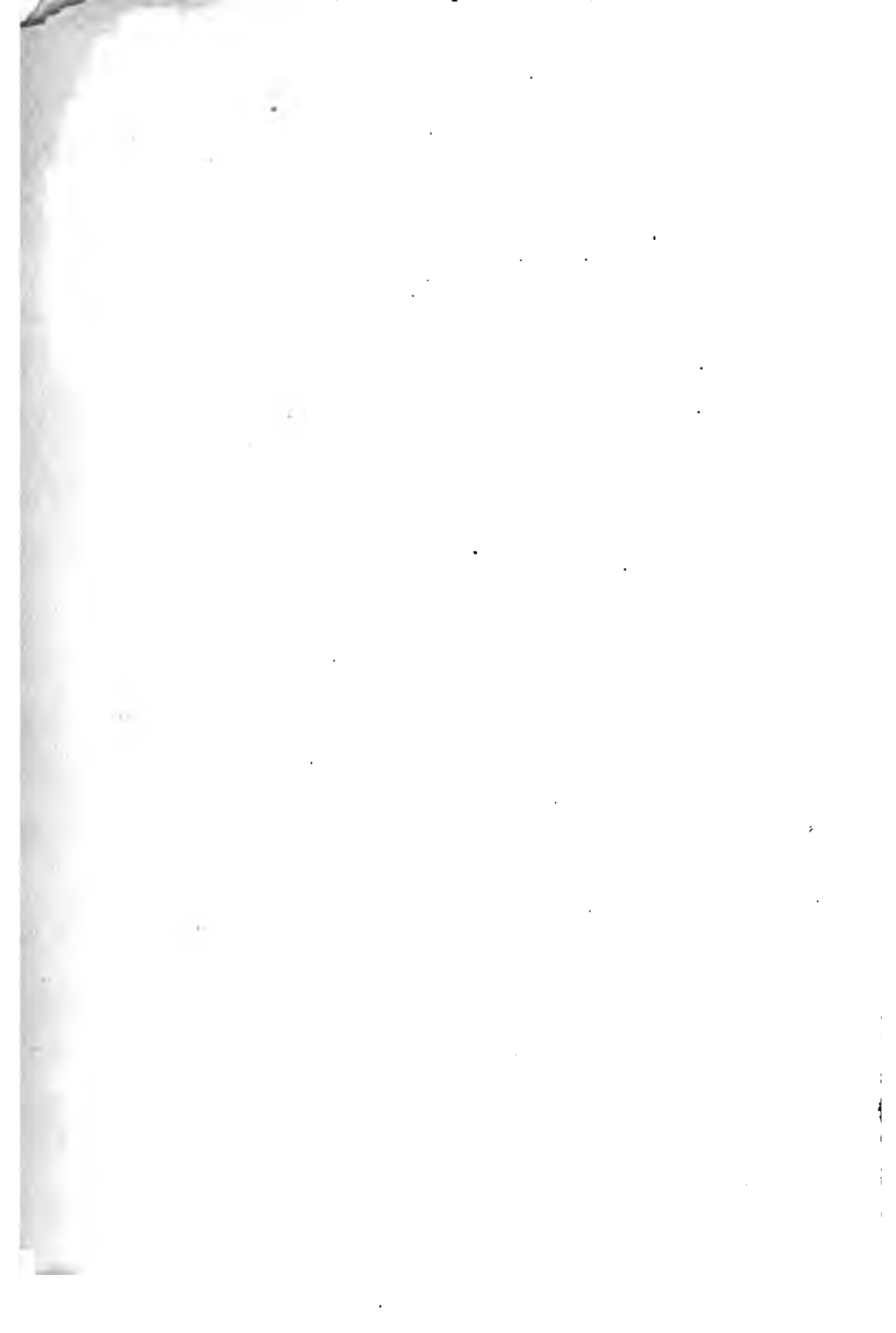


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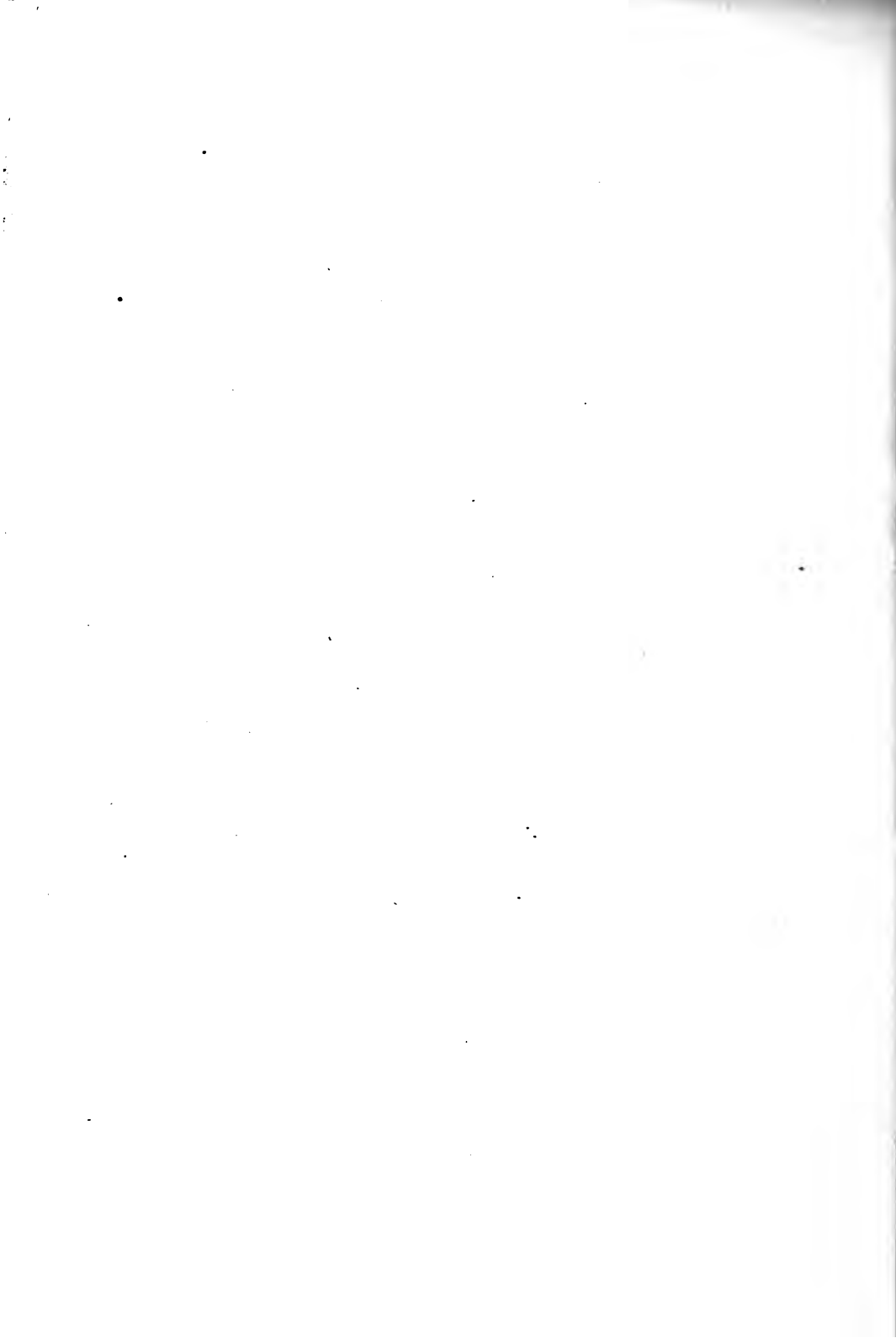
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CASES DETERMINED
IN THE
SUPREME COURT OF NEBRASKA
SEPTEMBER TERM, 1911.

SAMUEL W. HOCKETT, APPELLEE, V. LEVI BURNS ET AL.,
APPELLANTS.

FILED OCTOBER 6, 1911. No. 16,908.

1. **Mortgages: CONDITIONS: VALIDITY.** "A stipulation in a mortgage authorizing the mortgagee to accelerate the maturity of the mortgage debt, if the taxes on the mortgaged premises are not paid at or before the time they become delinquent, is not forbidden by statute, nor contrary to public policy, and may be enforced." *Plummer v. Park*, 62 Neb. 665.
2. ———: **DEFAULT: RIGHTS OF MORTGAGEE.** "And the payment of such delinquent taxes after the commencement of an action to foreclose the mortgage does not deprive the mortgagee of the right secured by the exercise of his option." *Plummer v. Park*, 62 Neb. 665.

APPEAL from the district court for Clay county: LESLIE G. HURD, JUDGE. *Affirmed.*

Ambrose C. Epperson, for appellants.

Paul E. Boslaugh, contra.

REESE, C. J.

This is an action to foreclose a mortgage on real estate. The mortgage was executed on the 18th day of November, 1908, to secure a debt of \$3,500, due November 1, 1912, with interest at the rate of 6 per cent. per annum. The exact provision of the mortgage over which the contention in this case arises is not set out in the abstract of the

petition, as should have been done, but it is sufficiently shown by the abstract and briefs that the mortgage contained a stipulation that, if the taxes on the property were not paid before they became delinquent, the debt secured by the mortgage should become due and collectible at once. It is alleged in the petition that the taxes of 1909, amounting to the sum of \$32.06, had not been paid, and had become delinquent. For that reason the suit was instituted to foreclose the mortgage.

The answer admitted the execution of the note and mortgage declared upon, but alleged that the mortgage contained the further provision that upon the nonpayment of the taxes by the mortgagors the "mortgagee may pay taxes, and the same, with interest at 10 per cent., shall be repaid by said mortgagor, and this mortgage shall stand as security for the same; that a failure to pay any of said money, either principal or interest, when the same becomes due, or a failure to comply with any of the foregoing agreements, shall cause the whole sum of money herein secured to become due and collectible at once." After the filing of the answer, plaintiff moved the court for a judgment and decree in his favor, on the ground that the answer did not present a defense to the suit. The motion was sustained, and a decree of foreclosure entered. Defendants appeal.

The contention of defendants is that the clause in the mortgage, that the "mortgagee may pay taxes" and add the amount paid to the principal debt, created a duty on the part of the mortgagee to pay the delinquent taxes; that, having failed to do so, he cannot maintain the suit to foreclose, and that the district court erred in entering the decree.

In our view of the case, every phase of the question involved has been decided by this court in *Hartsuff v. Hall*, 58 Neb. 417; *National Life Ins. Co. v. Butler*, 61 Neb. 449; *Plummer v. Park*, 62 Neb. 665; and that the clause permitting plaintiff to pay the taxes simply conferred an option upon him to do so if he so desired, provided he was

willing to increase the amount of his investment in the security to that extent, but imposed no obligation upon him so to do. In *National Life Ins. Co. v. Butler*, *supra*, we said: "We think by the plain terms of the contracts between the parties the creditor was given not only the right to make the payments which the debtor, in violation of his contract, failed to make, but also the further right, at its option, to declare the entire debt due and proceed immediately to collect it by suit." In *Plummer v. Park*, *supra*, we held: "A stipulation in a mortgage authorizing the mortgagee to accelerate the maturity of the mortgage debt, if the taxes on the mortgaged premises are not paid at or before the time they become delinquent, is not forbidden by statute, nor contrary to public policy, and may be enforced." Nor is the plaintiff's right to foreclose defeated by the payment of the delinquent taxes by the mortgagor after the commencement of the suit to foreclose, but before decree. *Plummer v. Park*, *supra*.

We find no error in the ruling and decision of the district court, and its decree is

AFFIRMED.

**FERDINAND J. O'CHANDER, APPELLEE, V. DAKOTA COUNTY,
APPELLANT.**

FILED OCTOBER 6, 1911. No. 16,531.

1. **Bridges: REPAIRS.** It is the duty of a county, when repairing a bridge situated upon and constituting a part of one of its public roads or highways, to make it safe and suitable for the uses to which it is ordinarily exposed prior to and at the time the repairs are made, and render it sufficient to meet the present ordinary necessities of the public. *Kovarik v. Saline County*, 86 Neb. 440.
2. **Appeal: CONFLICTING EVIDENCE.** In an action at law, the judgment of the district court, rendered upon conflicting evidence, will not be set aside by a reviewing court, unless it can be said that it is unsupported by the evidence and is clearly wrong.

APPEAL from the district court for Dakota county: GUY T. GRAVES, JUDGE. *Affirmed.*

J. J. McAllister, for appellant.

R. E. Evans, contra.

BARNES, J.

Action in the district court for Dakota county to recover damages sustained by the plaintiff by reason of the defective condition of a bridge situated upon, and which was a part of, one of the defendant's roads or highways. The record discloses that by agreement of the parties the cause was tried to the court without the intervention of a jury. The plaintiff had the judgment, and the defendant has appealed.

The facts as disclosed by the record are in substance that the bridge in question was built a number of years ago; that in November, 1907, it was repaired under the direction of the defendant's board of county commissioners; that the contractor who repaired it at that time informed the board that he had repaired it according to their directions but that further repairs were needed, and asked the board for permission to drive three piles at the north end of the bridge and place a new cap thereon, and that such repairs were needed to put the bridge in a safe and suitable condition. This additional work the board refused to authorize, and so the bridge was not properly repaired. The person who made the repairs was a witness in this case, and testified that the bridge appeared to be in good condition.

It further appears that on the day when the accident occurred the plaintiff was moving his threshing outfit, which consisted of an ordinary traction engine and separator, together with another wagon, which carried the tools and was used as a water tank, along the defendant's road and across the bridge in question; that, on arriving

at the bridge where the accident occurred, the threshing crew planked it in the usual manner, and ran the engine upon the bridge until it rested about the middle of the structure; that the separator was attached, and when it was pulled up over the approach and onto the bridge proper the engine was stopped; that it was then the purpose of the plaintiff to uncouple the engine from the separator, after which it was to be run the rest of the way across the bridge without the separator; that, in attempting to move the engine for that purpose, it caused some vibration of the bridge, and the defective or rotten cap upon which the further end of the bridge rested split off or gave way; that the end of the bridge fell, and the engine and separator ran into the creek, thus causing the damages of which plaintiff complained.

It therefore appears that the defective condition of the bridge, of which the defendant county had received notice at the time the repairs were made, was the cause of the accident. This state of facts seems to bring the case squarely within the rule announced in *City of Central City v. Marquis*, 75 Neb. 233, and *Kovarik v. Saline County*, 86 Neb. 440. In the *Kovarik* case it was said: "The sufficiency and state of repairs of bridges upon public highways referred to in section 117, ch. 78, Comp. St. 1909, must be applied to the uses to which a bridge is ordinarily exposed prior to and at the time of the accident by which it may be claimed injury to person or property was suffered. It should be sufficient to meet the present ordinary necessities of the public."

It seems clear that when the bridge in question was repaired it should have been made safe and suitable for the then ordinary uses of the public, which may include the moving of ordinary threshing outfits, which were no doubt known to be in common use at that time. We therefore think it clearly appears that the plaintiff established such a state of facts as entitled him to recover, unless he was himself guilty of contributory negligence, which appears to be the main defense interposed to pre-

vent a recovery. Upon that question the evidence is somewhat conflicting, but, as we view it, it preponderates in favor of the plaintiff, and fails to sustain the defendant's contention. The rule is well established that where, as in the case at bar, there is a conflict of evidence upon the material facts, touching the cause of action or defense, in an action at law, a reviewing court will not disturb the verdict of a jury or the findings and judgment of a trial court.

We find ourselves unable to say that the evidence in this case is insufficient to sustain the judgment of the district court, and it is therefore

AFFIRMED.

OMAHA & COUNCIL BLUFFS STREET RAILWAY COMPANY
ET AL., APPELLEES, V. CITY OF OMAHA ET AL., APPEL-
LANTS.

FILED OCTOBER 6, 1911. No. 16,541.

1. **Injunction: MUNICIPAL CORPORATIONS: INTERFERENCE WITH CORPORATE PROPERTY.** Where a city by the affirmative acts of its officers and agents has for a long series of years authorized and acquiesced in the expenditure of large sums of money and in the acquisition of valuable property by a corporation in establishing and conducting a business enterprise under a claim or color of right and contract to and with persons, companies and corporations to furnish them with valuable and indispensable services to enable them to carry on their business enterprises therein, a court of equity will restrain the city authorities from ousting the corporation by destroying its property and business without compensation.
2. **Evidence examined and found to require a modification and affirmance of the judgment of the district court.**

APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Affirmed as modified.*

Harry E. Burnham, I. J. Dunn and John A. Rine, for appellants.

John Lee Webster and Myron L. Learned, contra.

BARNES, J.

Action brought by the Omaha & Council Bluffs Street Railway Company in the district court for Douglas county to restrain the city of Omaha and Waldemar Michaelsen, as city electrician, from removing or causing to be removed all of the plaintiff's conduits, wires and poles located in, under, upon or over the streets, alleys, thoroughfares or public places of the defendant city, maintained and used by the plaintiff for furnishing or transmitting electricity to private parties or premises for light, heat or power purposes.

It appears that when the issues were made up the Burkley Printing Company, the Omaha Structural Steel Works, the McCord-Brady Company, Hayden Brothers, the Klopp & Bartlett Company, the Wilson Steam Boiler Company, the Williams & Mount Company, Frederick J. Wearne (doing business as Wearne Bros.) and Thomas F. Stroud (doing business under the name of T. F. Stroud & Company), persons, companies and corporations to whom the plaintiff for many years had been and was then furnishing electricity for those purposes, intervened and joined the plaintiff in its prayer for equitable relief. The cause was tried, and the district court found the facts generally in favor of the plaintiff and the interveners, decreed to them a permanent injunction, and from that judgment the defendants have appealed.

The contention of the parties may be briefly summarized as follows: The defendants claim that the plaintiff company had no franchise or right to occupy the streets, alleys and public places of the defendant city, but was a trespasser thereon; that, if it had any such right, the business of furnishing electricity to private parties or

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premises for light, heat or power purposes is outside of and beyond its corporate powers as a street railway company; that if the plaintiff had, by ordinance or otherwise, acquired any right to engage in that business within the defendant city, the right or power so obtained was a mere privilege or license, which could be revoked by the mayor and council of the defendant city at any time, and therefore the judgment of the district court was wrong and should be reversed. On the other hand, the plaintiff contends that it had a franchise as a street railway to conduct its business within the city of Omaha, which extends at least until the year 1917, and therefore it was not a trespasser upon the streets, alleys and public places of the defendant; that furnishing electricity for power, heat and light purposes to private persons, including the interveners, is incidental to and might be properly exercised as a part of its corporate powers; that the city had for some 20 years recognized the fact that the plaintiff had such incidental right and power, had in fact granted the same to the plaintiff by ordinance duly enacted by the mayor and city council in that behalf; had regulated the manner of the use of such power, and had ordered the plaintiff to separate its electric current and wires used for that purpose from those used for propelling its street cars, and place the same underground and in conduits; that the plaintiff had complied with such order at an expense of about \$140,000; that the threatened destruction of its property used for that purpose without compensation would result in great and irreparable loss and damage to the plaintiff, as well as to the interveners, and therefore the city was estopped to claim that it had the right to destroy plaintiff's property and business without compensation; that the judgment of the district court was right, and should be affirmed.

It appears from the bill of exceptions that in the year 1866 the territorial legislature granted to certain persons a corporate franchise, and authorized them to construct and operate a horse railway in the city of Omaha for the

period of 50 years; that in 1868 the city council passed an ordinance granting to the Omaha Horse Railway Company the right to maintain and operate a single or double-track railway over and along such streets within the limits of the city of Omaha as the company might thereafter select, providing the company should conform to the provisions of the act of the legislature incorporating it; that in May, 1888, there was submitted to a vote of the people of the city of Omaha an ordinance purporting to grant to the Omaha Cable Tramway Company a franchise to construct and operate a cable tramway in the city of Omaha; that the question was submitted to a vote of the people, and the city clerk thereafter certified that the proposed franchise had been carried or adopted; that the Omaha Cable Tramway Company was incorporated for the purpose of building and operating a cable tramway in the city of Omaha, in April, 1888; that in 1889 the legislature of this state passed a law (laws 1889, ch. 38) authorizing any street railway company existing in pursuance of law in this state, or which might thereafter be organized, whose road had been located and constructed so as to conform with the road of any other street railway company theretofore organized, thus making connected or continuous lines or routes of travel or transportation, to consolidate its railway property and appurtenances with such other street railway and convert its property and appurtenances into a single corporation; that after such consolidation should be completed the corporation resulting therefrom should by operation of law succeed to and hold in perpetuity all of the property, rights, powers and franchises conferred upon said constituent companies; that in March, 1889, the Omaha Cable Tramway Company and the Omaha Horse Railway Company, the two corporations which at that time claimed to own and possess franchises in the city of Omaha for the operation of street railways, and which were actually operating street railways in said city, consolidated by adopting and filing articles of incorporation and comply-

ing with the requirements of that law; that in 1887 there was submitted to and adopted by a vote of the people of Omaha an ordinance, called No. 1434, proposing to grant to a corporation called the Omaha Motor Railway Company a franchise for a period of 30 years, covering a number of streets in said city (which need not here be further described); that on November 1, 1889, the Omaha Motor Railway Company gave a deed of conveyance to the Omaha Street Railway Company, transferring to that company all of its rights, title and interest in and to its franchise and street railway interests in the city of Omaha; that on December 5, 1889, the first amendment to what was called the charter of the Omaha Street Railway Company, being the ordinance of consolidation between the Omaha Cable Tramway Company and the Omaha Horse Railway Company, was adopted; that on January 9, 1902, the second amendment to the articles of incorporation or charter of the Omaha Street Railway Company was also adopted; that on the 7th day of October, 1902, the stockholders of a corporation, called the Omaha & Florence Street Railway Company, amended its articles of incorporation, changing the name of that company to the Omaha & Council Bluffs Street Railway Company, and increasing its capital stock from \$200,000 to \$15,000,000; that on the 22d day of November, 1902, the Omaha Street Railway Company by deed conveyed to the Omaha & Council Bluffs Street Railway Company, the plaintiff herein, all of its properties, rights and franchises, and it is under the foregoing acts, ordinances and transfers that the plaintiff company claims the right to conduct the business of a street railway in the defendant city.

It will thus be seen that it cannot be said that the plaintiff has no color of right to operate its street railway within the defendant city. It appears, however, that neither the validity of plaintiff's franchise nor the length of its duration was considered or determined by the district court, and defendants in their brief concede that in justice to all the parties this court should at this time re-

frain from passing upon those questions. We therefore decline to definitely pass judgment upon them.

It further appears that as early as September, 1882, the city of Omaha, by its mayor and council, recognized the right of any person, company or corporation to erect and maintain poles upon and along the streets of the city of Omaha for the purpose of transmitting electric current, and by ordinance granted to the Northwestern Electric Light & Power Company authority to erect poles and conduct wires along the streets of the city for transmitting electric current, by which it was also provided that "the mayor and council may authorize any other company or person to use the wires and poles that may be erected, upon just compensation;" that in May, 1884, the city council passed ordinance No. 756, which was approved by the mayor, regulating the construction and maintenance of wires and conductors for transmitting electric current in the city of Omaha, which was a general regulation applying to the business of transmitting electric current by wires which by its terms applied to any person, company or corporation that elected or chose to transmit electric current for power purposes and thereby the city of Omaha recognized the right of an electric street railway company, if it chose to do so, to transmit electricity upon wires or conductors for general electric purposes; that in April, 1886, the city council passed ordinance No. 1031, which was duly approved, and the right of electric street railway companies or of any other person or company to transmit electric current by wires upon poles or other conduits for any legitimate business was thereby recognized, and to that end the ordinance provided, in substance, that any person or corporation, before making any excavation in any street or alley, or erecting poles for the placing of electric wires therein, should first obtain authority in writing so to do from the chief engineer of the fire department, and any person or company obtaining such permit was thereby authorized, empowered and entitled to either erect poles or construct

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conduits for the transmission of electric current for power and other purposes; that an ordinance was passed and approved in December, 1892, defining the duties of the city electrician of the defendant city, and establishing rules and regulations concerning electric wires and poles, which provided for the procuring of a license from the city electrician, and gave him the power over and control of all wires that might be used to carry an electric current for either light, heat or power. It appears that this ordinance applied to all persons or companies generating electric current for light, heat or power, and recognized the right of any person, company or corporation to furnish electricity for those purposes to whom permits should be granted under the terms of that ordinance; that under its terms permits were granted to the plaintiff company and its predecessor, the Omaha Street Railway Company, for the transmission of electric current for light, heat and power purposes; that the Omaha Street Railway Company began the sale of electric current for power purposes in February, 1892, and for lighting purposes in June, 1892, and the Omaha Street Railway Company and its successor, the Omaha & Council Bluffs Street Railway Company (the plaintiff herein), continued to furnish electric current for light, heat and power purposes to its customers from 1892 to the present time; that as early as 1893 the Omaha Street Railway Company began selling electric current to the board of education of the city of Omaha, to be used for power purposes, and the plaintiff company has continued so to do until a recent date; that under and by the terms of the ordinances above mentioned the plaintiff has contracted with, and has furnished electric current to, the interveners and others, by and with the consent of the city, and under the direction of the city electrician, and has complied with the regulations and ordinances of the city in that behalf.

It further appears that the city by ordinance required the plaintiff company to place its wires used for carrying electric current for power, light and heat purposes in

conduits underground; that by section 1 of an ordinance passed and approved in March, 1902, it was provided: "That all persons and companies owning, maintaining or operating electric wires or other wires in the city of Omaha and in the district hereinafter defined, for the transmission of electricity for light, heat and power, shall, on or before the 1st day of October, 1906, place underground all such wires, and after said date no person or companies shall be permitted to maintain in said district in any streets, alleys or public grounds of said city, any electric or other wires, without first complying with the provisions of this ordinance, excepting, however, such feeder and trolley wires as may be used for propelling street cars, and telephone and telegraph wires;" that the ordinance above quoted was intended and did apply to the plaintiff herein, and that thereafter the plaintiff complied with its terms by separating its wires used for the purpose of transmitting electricity for power, heat and light purposes from those used for propelling its street cars, purchased and installed machinery to that end, and placed its wires in conduits underground at a large expense, approximating \$140,000; that the plaintiff in furnishing electricity to the interveners and others has since complied with all of the rules and regulations adopted by the defendant city and its electrician; that the interveners, relying upon existing conditions and the facts above stated, have for many years obtained the electric power necessary to conduct and carry on their several lines of business in the city of Omaha, and under present existing conditions are unable to obtain such electric power from any other source.

We are therefore of opinion that the general finding of the district court in favor of the plaintiff and interveners was right, and should be adopted by this court. With this view of the case, we are not required to determine the question of the incidental powers of the street railway company. It is sufficient to say that the company supposed that it had the power under its charter to engage

in the business of which the defendants now complain, and the city by its officers and agents assumed that it had such power, and by its acts not only permitted, but induced, the plaintiff to expend large sums of money, acquire valuable property, and enter into contract relations with the interveners and others to carry on that business. It follows that it would now be unjust and inequitable to permit the city to destroy plaintiff's property and business, which it has thus fostered and encouraged, without compensation, and also deprive the interveners of their contractual rights therein.

A like question was before us in the case of *State v. Lincoln Street R. Co.*, 80 Neb. 333, where it was said: "The courts, in a proper case, will apply the doctrine of laches to a case in which the state is a party plaintiff. The state, like individuals, may be estopped by its acts or laches, and should not be allowed to oust a corporation of its rights and franchises where, for a long series of years, it has stood silent and seen the corporation expend large sums in the acquisition of property and improvements made thereon under a claimed right so to do under its charter." This is a well-recognized rule of equity, and is supported by *City of Chicago v. Union Stock Yards & Transit Co.*, 164 Ill. 224; *Chicago & N. W. R. Co. v. West Chicago Park Commissioners*, 151 Ill. 204; *Village of Winnetka v. Chicago & M. E. R. Co.*, 204 Ill. 297; *City of DeKalb v. Luney*, 193 Ill. 185; *Spokane Street R. Co. v. City of Spokane Falls*, 6 Wash. 521, 33 Pac. 1072; *Town of New Castle v. Lake Erie & W. R. Co.*, 155 Ind. 18; *City of Sioux City v. Chicago & N. W. R. Co.*, 129 Ia. 694; *Gregsten v. City of Chicago*, 145 Ill. 451; *People v. City of Rock Island*, 215 Ill. 488. We deem further citation of authorities in support of this rule unnecessary. We are of opinion that the facts of this case bring the defendants within the rule of *State v. Lincoln Street R. Co.*, *supra*, and therefore the judgment of the district court should be affirmed.

Finally, it is suggested by the defendants that, if the

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judgment of the district court should be affirmed, the injunction awarded should be modified. We think there is much force in this contention. It appears that the injunction by its terms was made perpetual, and, if not modified, may be at some future time construed so as to forever prevent the city from ousting the plaintiff from its streets and alleys under any circumstances. It seems clear that the operation of the order of injunction should not extend beyond the date of the expiration of the plaintiff's franchise, and that the defendant should only be restrained from interfering with or destroying the plaintiff's conduits, poles, wires and other property without compensation while the present conditions exist, and until the expiration of the plaintiff's alleged or colorable franchise.

It is therefore ordered that the injunction be so modified, and as thus modified the judgment of the district court is affirmed.

AFFIRMED AS MODIFIED.

SEDGWICK, J., concurs in affirming the judgment of the district court.

**ALEXANDER D. GWIN ET AL., APPELLANTS, V. T. HENRY
FRESE ET AL., APPELLEES.**

FILED OCTOBER 6, 1911. No. 16,977.

1. **Taxation: FORECLOSURE OF LIEN: JURISDICTION.** In an action to foreclose a lien for taxes, when the action is against the land itself, and the petition, duly verified, contains the allegation that the owner of the land is unknown, the court will not be without jurisdiction for want of such allegation in the affidavit for service by publication.
2. —: **TAX SALE: COLLATERAL ATTACK.** The sheriff's sale, based on such a decree of foreclosure, after it has been examined and confirmed by the court which rendered the decree, is not subject to collateral attack for irregularity.

APPEAL from the district court for Antelope county:
ANSON A. WELCH, JUDGE. *Affirmed.*

M. F. Harrington, for appellants.

Charles H. Kelsey and J. W. Rice, contra.

BARNES, J.

Action in the district court for Antelope county to set aside a sheriff's deed based on a tax foreclosure decree against a quarter section of land situated in that county, and to redeem from the tax lien upon which the decree was based. The defendants had the judgment, and the plaintiffs have appealed.

The plaintiffs' petition in this action sets forth the following facts: That one Charles A. Gwin obtained a receiver's receipt for the quarter section of land in question on the 12th day of July, 1887; that thereafter, and on the 31st day of January, 1890, a patent was issued to him therefor by the United States government, and that he thereby became the owner of the land in fee simple; that he was the owner thereof at the time of his death, which occurred in Antelope county, Nebraska, on the 4th day of December, 1887; that he died intestate, and that plaintiffs are his heirs; that on the 5th day of December, 1900, the county of Antelope commenced an action to foreclose its tax lien, and named Charles A. Gwin, Mrs. Gwin, his wife (name unknown), and the land in question as defendants.

The petition further sets forth the facts relating to the tax lien, together with all of the foreclosure proceedings, including the service, the decree, sale, confirmation and sheriff's deed; and alleged that the district court which rendered the tax foreclosure decree had no jurisdiction of the parties to, or the subject matter of, that action. Plaintiffs also attacked the manner in which the sheriff's sale was conducted. To this petition the defendants filed a

general demurrer, which the trial court sustained. The plaintiffs elected to stand upon their petition, judgment was rendered dismissing their action, and they now contend that the judgment of the district court was erroneous for the reasons above stated.

It is argued that the land in question was not made a party defendant in the tax foreclosure proceeding, and that the affidavit for service by publication was insufficient to confer jurisdiction upon the court to pronounce the decree of foreclosure. It appears from the abstract that the land was named as a party defendant in the title and petition in the foreclosure suit, and in the notice published for service. It was also alleged in the petition that the owner of the real estate in question was unknown to the plaintiff, and the petition was duly verified. By section 1, art. V, ch. 77, Comp. St. 1899, which was in force at the time the foreclosure proceedings were had, it was provided, among other things, that any person might bring an action to foreclose a tax lien; and in the case of *Lancaster County v. Trimble*, 34 Neb. 752, it was held that in a legal sense a county was a person, and that the provisions of article V applied to counties. By section 3, art. V, it was provided: "All petitions for foreclosure or satisfaction of any such tax lien shall be filed in the district court in chancery, where the lands are situated." By section 4 it was further provided: "Service of process in causes instituted under this chapter shall be the same as provided by law in similar causes in the district courts, and where the owner of the land is not known the action may be brought against the land itself, but in such case the service must be as in the case of a nonresident; if the action is commenced against a person who disclaims the land, the land itself may be substituted by order of the court for the defendant, and the action continued for publication."

The land in question was made a defendant in the foreclosure suit, and the fact that the land was named as a defendant in the plaintiff's petition in that case and in the

published notice for service, together with the allegation contained therein, which was duly sworn to, "that the owner of said real estate is unknown to the plaintiff," was sufficient upon that point to give the court jurisdiction of the cause of action.

It also appears that the usual affidavit for service by publication was filed; that thereupon such substituted service was had, which was regular in all respects; but it is contended that the failure to allege in the affidavit for service by publication that the owner of the land was to the plaintiff unknown rendered such publication void, and therefore the court was without jurisdiction to pronounce the decree of foreclosure. On the other hand, the defendants contend that the statute nowhere provided for the filing of an affidavit in order to procure service by publication where the owner of the land was unknown to the plaintiff.

As far as we are able to ascertain, this question is before us for the first time. The parties have cited no authorities which directly determine this point, and after a somewhat extended research we have failed to find any; but in some of our former decisions, and in tax foreclosure cases determined in other jurisdictions, we find expressions which are of some assistance in disposing of this question. The case of *Leigh v. Green*, 62 Neb. 344, was one attacking a tax foreclosure decree for want of jurisdiction. In that case it appeared that the land was made a party defendant in the foreclosure suit; service was had by publication only; there was an affidavit, alleged to be fatally defective, which contained a statement that the owner of the land was unknown; the decree was held valid and not subject to collateral attack; and it was said, among other things: "One of the grounds urged against the sufficiency of the affidavits is that the object of the action is not set forth. Each affidavit contains the following statement: 'This case is one of those named in section 77, title V, of the code of civil procedure of the state of Nebraska.' In *Majors v. Edwards*, 36 Neb. 56,

this court held that such a statement of the object was sufficient, although at the same time it intimated that the better practice would be to set out the object of the action more fully. But it will be observed that the language above quoted is followed by the further statement, 'and is an action relating to real property in said state, in which the defendants have or claim a lien or interest, actual or contingent, and the relief demanded consists, wholly or partially, in excluding the defendants from any interest therein.' Plaintiff contends that, assuming that the object is sufficiently stated by saying that the action is one of those named in said section 77, the subsequent statement renders the affidavit invalid, for the reason that the object thereby stated is different than that sought in the actions, and that such statement being specific must prevail over the general statement. It must be kept in mind that an affidavit for service by publication is not required for the information of the defendant as to the nature and object of the action. The sole purpose of such an affidavit is to enable the court upon inspection to determine whether the action is one in which jurisdiction may be obtained by service by publication; when it is sufficient for that purpose, it serves the only purpose for which it is intended. The affidavits under consideration, fairly construed, mean that the actions, wherein they were respectively filed, were those named in section 77, title V, of the code of civil procedure, and that the relief demanded consisted in part of excluding the defendant Root from any interest in the lands described. The relief sought by those actions was the foreclosure of certain tax liens on the several subdivisions of the land, and the sale thereof, for the satisfaction of the amount found due. In the petitions filed in the several cases it is alleged 'that the owner of said land is not known, and the defendant Henry A. Root has, or claims, some interest therein.' The prayer of each, in part, is for the adjudication that plaintiff's tax lien is a first lien on the land, and that the deed issued in pursuance of such proceedings be an absolute

bar against each and all of the defendants, and for such other and further relief as may be deemed equitable in the premises. In our opinion, the affidavits were sufficient to advise the court of the nature of the actions, and that the actions were of such a character that it could acquire jurisdiction by service by publication. It follows, therefore, that the affidavits were sufficient for all purposes, especially when assailed in a collateral proceeding."

That case was again before this court, and our former judgment was adhered to. See *Leigh v. Green*, 64 Neb. 533, where it was said: "When the owner of the land is not known to the holder of a tax-certificate, and cannot be found upon reasonable inquiry, the holder of such certificate may make the land a party to foreclosure proceedings; and in such case allegations in the petition and an affidavit for service by publication on information and belief, to the effect that the owner is unknown, are sufficient as against collateral attack." It was further said: "Whether or not, in such case, the plaintiff may join as defendants persons claiming some interest in the land, if the land is properly made a party, such joinder could at most be an irregularity only, and would not affect the validity of the proceedings when attacked collaterally." It was also held: "If the land is properly made a party, and jurisdiction over it is duly acquired by publication of notice, a sale under decree of foreclosure creates a new and independent title, and bars all pre-existing interests or liens." The petition attacked in that case and the one in the case at bar are alike; and in view of the foregoing, when we take into consideration the fact that our statute, at the time the foreclosure proceeding was had, made no direct provision for the filing of an affidavit in order to obtain service by publication when the owner of the land was unknown, and contained no statement as to what such an affidavit, if it were filed, should contain, together with the fact that the plaintiffs' petition in the foreclosure case contained a positive and direct statement that the owner of the land embraced in the tax lien sought to be

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foreclosed was unknown, we are of opinion that the court had jurisdiction in that case, and that the decree of foreclosure which was rendered therein is not subject to collateral attack. Therefore the plaintiffs' contention upon this point cannot be sustained. We are confirmed in this view of the question by Black, Tax Titles (2d ed.) sec. 170; *Payne v. Lott*, 90 Mo. 676; *Goldworthy v. Thompson*, 87 Mo. 233; *Coombs v. Crabtree*, 105 Mo. 292; *Eitel v. Foote*, 39 Cal. 439; and *Truman v. Robinson*, 44 Cal. 623. In the California cases it was held that, where, as in the case at bar, the findings in the decrees were that due and legal service had been made upon all of the defendants, the decrees could not be collaterally attacked on the ground of defective service.

As to the plaintiffs' contention that the sale was void, it may be said that there is no allegation in the petition that it was not necessary to sell the entire tract of land to satisfy the decree; or that any less than the amount sold would have brought enough to discharge the tax lien and costs of foreclosure suit. Again, where it appears, as it does in this case, that the sale was examined and confirmed by the court rendering the decree, that question is not an open one in a collateral attack upon the proceedings in the foreclosure suit.

For the foregoing reasons, we are of opinion that the judgment of the district court was right, and it is therefore

AFFIRMED.

VILLAGE OF SCRIBNER, APPELLANT, V. WILLIAM MOHR ET AL., APPELLEES.

FILED OCTOBER 6, 1911. No. 16,538.

1. **Hawkers: LICENSES.** A grocer who takes orders for goods, fills them at his store and delivers them by wagon to customers in a neighboring village, is not "a hawker of goods by retail, by sample or by taking orders or otherwise," so as to be within

the provision of an ordinance of the village imposing a license tax on such hawkers.

2. **Licenses: CANVASSERS.** Where such grocer maintains a delivery wagon, and an employee delivers goods previously ordered from him when making a former delivery or which have been ordered by letter or telephone from the customer direct to the store, the fact that a patron receiving goods orders others from the person delivering, not being asked, solicited or requested so to do by him, does not establish the fact of "canvassing or soliciting orders for any article, goods or merchandise," under the provisions of an ordinance imposing a license tax on such occupation, so as to render either the agent or his principal liable for the tax.

APPEAL from the district court for Dodge county:
CONRAD HOLLENBECK, JUDGE. *Affirmed.*

A. H. Briggs, for appellant.

Courtright & Sidner, contra.

LETTON, J.

The village of Scribner is an incorporated village with less than 5,000 inhabitants. An ordinance of the village provided that a license tax upon each occupation and business therein named was levied "on each hawker of goods by retail, by sample, or by taking orders or otherwise, per day \$2.00. This does not include commercial travelers selling only to dealers." Another provision is "on each person engaged in canvassing or soliciting orders for any article, goods or merchandise, except books or printed matter, per day \$2.00."

This action is brought to recover the penalty for a violation of these provisions by the defendants. The amended petition charges that the defendant, the Moyune Tea Company, carried on within the village, and on certain specified dates in 1906 and 1907, the business "of a hawker of goods by retail, by sample, or by taking orders or otherwise." Another count is that on the dates specified the defendant, in the village of Scribner, did "engage in

and conduct the business of canvassing or soliciting orders for articles, goods and merchandise, not including books or printed matter, * * * and did so take and receive from divers persons, within said village, orders for such articles * * * without paying the license tax therefor as in said ordinance provided." A verdict was returned for defendants, and from a judgment of dismissal the village of Scribner has appealed.

A number of defenses are pleaded in the answer, but as the case stands we think it unnecessary to do more than refer to two points in order to dispose of appellant's contentions.

The district court instructed the jury that there was no evidence that the defendant or its agent was hawking or peddling goods, and that upon that claim the verdict should be for the defendant, and that the only question for their consideration was whether the defendant, through its agent, was engaged in the soliciting of orders for the sale of goods at retail in the village at any time in the months charged. The plaintiff assigns as error the refusal of the court to give each of instructions Nos. 6, 7 and 8, requested by it. We think the gist of the sixth instruction was given by the court in the second one given upon its own motion. We are also of the opinion that instruction No. 7 was an erroneous statement of the law, and therefore was properly refused. This was the view taken by the district court when it directed the jury that under the evidence in the case the defendant or its agent was not guilty of hawking or peddling goods. The substance of instruction No. 8 was given by the court on its own motion, hence it was not error to refuse it.

The evidence shows that the Moyune Tea Company carries on a grocery business in the city of Fremont, Dodge county, in which county the village of Scribner is situated, that it maintained a delivery wagon and employed William Mohr to deliver groceries, teas and flavoring extracts; that he made periodical visits to the village of Scribner, and that on these visits he would deliver

groceries which had been previously ordered and would receive orders to be delivered later. It also shows that some of the goods delivered by Mohr were ordered by mail or telephone by customers in Scribner. The testimony as to what Mohr actually did in Scribner is meager; but it is to the effect that Mohr delivered goods there at stated periods to fill orders, and that when he did so customers needing other articles would give him orders to be filled at the next delivery. There is no proof that new customers were sought, or that Mohr ever asked for, solicited or requested orders from any person or did any soliciting or canvassing whatever, and there is no evidence of hawking or peddling. We are convinced that the defendant was not a hawker or peddler, so as to be subject to the provisions of the ordinance imposing a tax on hawkers. Webster's New International Dictionary defines "hawker": "One who sells wares from place to place or by crying them in the street;" and under the definition of "peddler" says: "In the United States *peddler* and *hawker* are used as synonymous in statutes regulating the vending of goods." That this is the generally accepted definition in this country, see *City of Davenport v. Rice*, 75 Ia. 74, 9 Am. St. Rep. 454; *Commonwealth v. Farnum*, 114 Mass. 267; *State v. Bristow*, 131 Ia. 664; *State v. Gibbs*, 115 N. Car. 700, 20 S. E. 172; *Village of Stamford v. Fisher*, 140 N. Y. 187.

The jury found that the defendant was not guilty of canvassing or soliciting orders under the other provision of the ordinance. Under the evidence, we cannot see how any other verdict would have been proper. Mohr was not soliciting or canvassing, as these words are usually defined. Webster's New International Dictionary defines the word "canvass": "(2) To solicit or seek orders, contributions, support, subscriptions, votes, or political support before an election, etc.; to solicit, commonly followed by *for*, as to *canvass for* a seat in Parliament; to *canvass for* a book, a publisher, or in behalf of a charity," and defines "solicit": "To ask earnestly; to make petition to;

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to appeal to (for something), as, to *solicit* a man for alms. (2) To endeavor to obtain by asking or pleading; to plead for, as to *solicit* an office, a favor, alms." This is the meaning applied in the case of *Ex parte Siebenhauer*, 14 Nev. 365. We are of opinion that under the language of the ordinance the acts of the defendant, so far as the evidence shows, were not in violation thereof.

The judgment of the district court was correct, and is

AFFIRMED.

ANNA KAST, APPELLEE, v. JACOB LINK, APPELLANT.

FILED OCTOBER 6, 1911. No. 16,708.

1. **Assault and Battery:** EVIDENCE. Evidence examined, and held to support the verdict.
2. ———: DAMAGES. Instruction set forth in the opinion approved.

APPEAL from the district court for Buffalo county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

W. D. Oldham, for appellant.

E. C. Calkins, contra.

LETTON, J.

This is an action to recover damages for assault and battery. The petition alleged that the plaintiff, before the assault, was a strong and healthy woman, earning from \$500 to \$600 per annum, and that the assault resulted in a permanent injury to her head and nervous system, and has greatly impaired and diminished her ability to work. The answer practically admitted the assault, and pleaded self-defense. The evidence showed that plaintiff and defendant were neighbors, and that as the plaintiff was passing along the highway, looking for some strayed cattle, she met the defendant. Some words passed between them

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with reference to the cattle. The plaintiff walked on, and afterwards the defendant caught up with her, and after a few words struck her a blow upon the side of the head and also upon the shoulder. The defendant in his testimony admits striking her upon the head, so that the blow "spun her around," but denies a second blow, and says that he did not strike her until she made a threatening movement as if to strike him. The jury returned a verdict for the plaintiff in the sum of \$2,000.

Defendant assigns as error that the judgment of the district court is not supported by sufficient evidence; that the damages awarded are excessive; and that the court erred in giving paragraph 8 of the instructions.

It is clear that the first assignment is untenable. Upon the oral argument, the latter two assignments only were discussed.

If the jury believed the testimony of Dr. Smith, the family physician, who attended the plaintiff, the damages are not excessive. He testified that he was called to attend the plaintiff immediately after the assault, and found she had sustained injuries to the right side of the head and on the right shoulder near the shoulder blade, which produced extreme pain; that she was in an apparently prostrated condition, and that the symptoms indicated that she had received a nervous shock, as well as sustaining an injury to the tissues. He was again called to attend her on the 10th, 14th and 28th of April, and one day in May, and medicine was procured from him at intervals until the latter part of October. He testified that as the case progressed there were indications of neuritis and inflammation of the nerves; that she is still suffering from the injury, and that it will take a long time for her to recover. There was some testimony on behalf of the defendant tending to show that the plaintiff was able to perform farm work of a nature sometimes performed by women, such as feeding hogs, and raking hay, although this testimony was contradicted by the plaintiff. There is no substantial conflict in the tes-

timony as to the nature and extent of plaintiff's injuries, and we are satisfied that the evidence amply sustains the award of damages made by the jury. Instruction No. 8 is as follows: "You are instructed that, if from the evidence and instructions in the case you find for the plaintiff, you will then allow the plaintiff damages in such sum as you believe, from all the evidence in the case, will actually compensate her for the injuries sustained by her, if any. You will take into consideration the nature, location and extent of the injury. You will allow plaintiff the fair and reasonable amount of necessary medical services for which plaintiff may have become obligated, if any, and for her loss of time from her occupation, if any. You will also allow plaintiff damages for her mental and physical suffering, if any such has been proved. Mental suffering and physical pain are incapable of measurement by any fixed and arbitrary rule, but must from its nature depend largely upon the judgment of the jury, governed by the circumstances of the particular case. You cannot allow damages by way of punishment. That is for the criminal law, and not for the jury in a civil case. The damages, if any allowed, must be compensatory only." This instruction is complained of on the ground that "it lets in every remote and speculative damage that the excited imagination of the triers of fact might conjecture, whether it be the direct and proximate cause of the injury or not." We think, when considered as a whole, it is not subject to this criticism. It is substantially the same as one which was approved in *McClure v. Shelton*, 29 Neb. 370.

One of the contentions of the defendant, and we think that on which he really relies, is that the verdict is larger than it would have been if the injured person had been a man, instead of a woman, and that the instruction permits the jury to take this fact into account. We are not aware of any distinction in law with reference to the measure of damages in cases where the assaulted person happens to be a woman. It may be true that a gallant

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jury may naturally be inclined to award heavier damages where the assailant is a man and the injured person is a member of the gentler sex; but, if the evidence sustains the recovery, a reviewing court can take no account of this tendency.

We find no error in the record, and the judgment of the district court is

AFFIRMED.

ALBERT W. BRADLEY, APPELLANT, V. CHICAGO, BURLINGTON & QUINCY RAILWAY COMPANY, APPELLEE.

FILED OCTOBER 6, 1911. No. 16,471.

1. **Appeal: INSTRUCTIONS.** If a defeated litigant tendered no requests to instruct the jury, a failure by the trial court to include in its charge some principle of law proper to have been mentioned will not justify reversing the case, where the issues are stated and the charge contains no prejudicial misstatements of law.
2. **Railroads: FIRES: EQUIPMENT.** It is the duty of a railroad company to equip its locomotive engines with such appliances for the control of sparks as the progress of science and improvement demonstrate are the best for that purpose, and which are generally known, or should be known, by those in control of the construction and repair of its engines.
3. ———: ———: **INSTRUCTIONS: NEGLIGENCE.** The plaintiff, in an action against a railroad company to recover damages for an alleged negligent setting out of a fire, has no just ground for complaint because the trial court instructed the jury that the carrier was not guilty of negligence in using lignite coal as a fuel, unless thereby the hazard of fire was so materially increased that a reasonably prudent man would not ordinarily have used the coal for that purpose.
4. ———: ———: **EXCLUSION OF EVIDENCE.** In an action for negligently setting out a fire, where the particular engine from which the fire escaped is fully identified, it is not error for the court to exclude evidence that on other occasions fire escaped from the defendant's other engines.
5. **Appeal: INSTRUCTIONS.** Where, upon a consideration of the entire record, it is evident that the defendant was not liable, a verdict in its favor should not be disturbed because the instructions in immaterial matters do not accurately state the law.

APPEAL from the district court for Adams county:
HARRY S. DUNGAN, JUDGE. *Affirmed.*

*R. A. Batty, T. A. Hollister and H. F. Favinger, for
appellant.*

James E. Kelby and Frank E. Bishop, contra.

ROOT, J.

This is an action for damages for the destruction of the plaintiff's barn by a fire kindled, as alleged, by reason of the defendant's negligence. The defendant prevailed, and the plaintiff appeals.

There is practically no conflict in the evidence. The plaintiff principally complains that the instructions are erroneous. Since the plaintiff did not assist the trial court by requests to charge, the instructions should be sustained, unless, when considered together, they are prejudicially erroneous.

The fourth subdivision of the second paragraph of the charge is criticised because the jurors were not told that the defendant was required to equip its locomotive engines "with the best-known appliances for the prevention of the escape of fire." No such burden is by law imposed upon the defendant. If, at the time the fire escaped from the engine, the locomotive was equipped with the best or most improved appliances that were known, or that should have been known, by the defendant, and in general practical use under such circumstances as surrounded the particular locomotive, and these appliances were in good repair, the defendant was not guilty of negligence in the matter of that equipment. *Spaulding v. Chicago & N. W. R. Co.*, 30 Wis. 110; *Hagan v. Chicago, D. & C. G. T. J. R. Co.*, 86 Mich. 615; *Southern R. Co. v. Thompson*, 129 Ga. 367. The evidence is uncontradicted that at the time the plaintiff's barn was destroyed the locomotive was thus equipped. The assignment must, therefore, be overruled.

Instructions numbered 3 and 4, which relate to contributory negligence, are assailed as not applicable to the evidence. If these instructions were in no manner aided by other parts of the charge, the plaintiff might have cause for complaint; but in the tenth paragraph the jurors were told that contributory negligence could not be predicated upon the plaintiff's proper use of his property, nor was he required to take unusual precautions to protect it; and in the eleventh paragraph the jury were told in precise language that, although the plaintiff failed to use ordinary care to protect his property, he might recover if it "was destroyed as the result of the negligence and carelessness of the defendant company." So, while there seems to be some confusion in the instructions on this subject, and the evidence tending to prove contributory negligence is slight indeed, we do not believe the jury were misled by these instructions.

Instruction numbered 6 is criticised. It informed the the jury that the defendant should not be held negligent in using lignite coal for fuel in its locomotive engines, unless that use so materially increased the hazard of fire that a reasonably prudent man would not ordinarily have used the fuel. We find no allegation in the petition that the defendant was negligent in using lignite coal; but evidence was received without objection on this point, and it may be considered as an issue tried by the parties. Without deciding whether the plaintiff might predicate a right of recovery upon the particular kind of fuel consumed in the locomotive engine, we are of opinion that in any event the instruction is as radical as the plaintiff had a right to demand. *Raleigh Hosiery Co. v. Raleigh & G. R. Co.*, 131 N. Car. 238, 42 S. E. 602.

The district court was right in excluding evidence tending to prove that on other occasions sparks emitted from the defendant's locomotive engines kindled fires in the town of Juniata. The evidence definitely identified the particular locomotive responsible for the fire, if it was caused by sparks emitted from the defendant's engine,

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and the evidence was properly confined to the condition of that machine. *Abbott v. Chicago, B. & Q. R. Co.*, 88 Neb. 727.

The plaintiff's brief contained an admission that the spark arrestors in the defendant's locomotive were in no manner defective. The evidence is uncontradicted that none better were then in use and known to those in charge of the construction and repair of the defendant's engines, and there is no evidence tending to prove that those officials should have known of superior devices for that purpose. The evidence is also uncontradicted that there was nothing unusual in the management of the locomotive at the time the fire was set out. The engineer and fireman were skilled mechanics, accustomed to the particular run, and exercised care in controlling the engine and the fire therein. If it be conceded that the defendant's witnesses told the truth, and we detect nothing unreasonable or improbable in their testimony, the defendant was not liable for the destruction of the plaintiff's property. We do not approve all of the court's charge, but we are convinced there is nothing therein that could have misled the jury.

Finding no error prejudicial to the plaintiff, the judgment of the district court is

AFFIRMED.

ALGERNON S. PATRICK, APPELLEE, V. GEORGE E. BARKER,
APPELLANT.

FILED OCTOBER 6, 1911. No. 16,472.

1. **Appeal:** PETITION: SUFFICIENCY: CONCLUSIVENESS OF FORMER DECISION. "A decision of this court holding that a petition states a cause of action is an adjudication that the facts pleaded will, if admitted or proved, entitle the plaintiff to the relief demanded." *Smith v. Neufeld*, 61 Neb. 699.
2. —: VARIANCE. "A judgment will not be reversed for a variance between plaintiff's allegations and his proof, unless it is

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clearly shown to be material and that the defendant has been misled thereby to his prejudice in making his defense." *Westing v. Chicago, B. & Q. R. Co.*, 87 Neb. 655.

3. ———: EXCLUSION OF EVIDENCE. Where excluded evidence is not material, unless other proof is made, and no evidence is received or offered to establish that proof, such exclusion will not justify reversing a judgment of the district court.

APPEAL from the district court for Douglas county:
HOWARD KENNEDY, JUDGE. *Affirmed.*

W. J. Connell and Walter P. Thomas, for appellant.

John L. Webster and Robert W. Patrick, contra.

ROOT, J.

This is the second appeal in this action. In our first opinion, reported in 78 Neb. 823, we held that the facts stated in the petition stated a cause of action in the plaintiff's favor; that the defendant's promise was several; and that the judgment in the foreclosure suit, prosecuted by the National Bank of Commerce against Grossman and the plaintiff, did not bar the instant action. It follows that, if the proof sustains the allegations in the petition, and the defendant has not by plea and proof avoided the effect thereof, the judgment must be affirmed, unless prejudicial error was committed during the trial. *Smith v. Neufeld*, 61 Neb. 699.

The testimony is in sharp conflict, but if the jury believed the plaintiff and his witnesses the evidence sustains the verdict. The argument that the evidence definitely establishes a contract within the statute of frauds cannot be accepted to overturn the decision of this court on the former appeal, because the evidence does not refer to a contract, other than the one pleaded by the plaintiff. Upon the authority of our former decision, the contract is held not to be within the statute of frauds. Likewise that decision disposes of the contention that the contract is not several, and the defense of *res adjudicata*.

The argument that there is a fatal variance between the pleading and the proof does not appeal to us. It is true that the evidence tends strongly to prove that Messrs. Barker and Johnson did not contemplate organizing the National Bank of Commerce at the time the plaintiff and his brother were solicited to subscribe to the stock of the state bank; but there is some evidence to the contrary, and the variance, if it exists, is not material. The consideration would exist in either event. *Trenholm v. Kloepper*, 88 Neb. 236. The variance, if any, is controlled by section 138 of the code, which provides, in effect, that a variance will not be deemed material, unless the adverse party has been thereby actually misled to his prejudice in a material matter. *Westing v. Chicago, B. & Q. R. Co.*, 87 Neb. 655.

The defendant further contends that in the settlement made by the plaintiff with the National Bank of Commerce the stock of that bank was received as a credit in the sum of \$3,000, and that the court erred in not permitting the defendant to testify to the value of the stock—that it was valueless. The testimony of the plaintiff that he sold the stock to Mr. Evans, president of the bank, for \$3,000 before the settlement of the deficiency judgment and the claim against the estate of M. T. Patrick, and that by this sale and the delivery of the plaintiff's check these judgments were paid, is uncontradicted; and while it may be, as the defendant contends, that Mr. Evans purchased for the bank, and that no money was paid or credits transferred by Evans to it, those facts do not appear from a consideration of the evidence. In the state of the record, we are inclined to the belief that no prejudicial error was committed by this ruling. The other errors assigned do not seem of sufficient importance to justify extending this opinion by specific reference thereto.

Not having found in the record error prejudicial to the defendant, the judgment of the district court is

AFFIRMED.

FAWCETT, J., concurring.

I am not entirely in harmony with our former opinion (78 Neb. 823); but, under the well-settled rule, that opinion has become the law of the case. For that reason alone, I concur.

WILLIAM A. MARTIN, APPELLEE, v. GEORGE W. HUTTON,
APPELLANT.

FILED OCTOBER 6, 1911. No. 16,500.

1. Action: MONEY HAD AND RECEIVED. An action for money had and received will lie to recover money secured from the plaintiff, without consideration, in reliance upon fraudulent representations made by the defendant.
2. Fraud: FALSE REPRESENTATIONS. "A person is justified in relying on a representation made to him in all cases where the representation is a positive statement of fact, and where an investigation would be required to discover the truth." *Perry v. Rogers*. 62 Neb. 898.
3. Action: MONEY HAD AND RECEIVED: FALSE REPRESENTATIONS. Where a defendant by the use of fraudulent representations induces a proposed entryman of government land to believe that the land he desires has been entered, but that the defendant will secure a relinquishment of that entry if paid a sum of money, and the money is paid in good faith upon the strength of those representations, the entryman, upon discovering the truth, may maintain a suit in the nature of an action for money had and received, and will not be required to abandon the land as a condition precedent to maintaining the action.
4. Principal and Agent: PROOF OF AGENCY. The fact of agency may be proved by circumstantial evidence.

APPEAL from the district court for Dawes county:
JAMES J. HARRINGTON, JUDGE. *Affirmed*.

J. E. Porter and A. W. Crites, for appellant.

A. M. Morrissey and A. G. Fisher, contra.

Root, J.

This is an action for money had and received. The plaintiff prevailed, and the defendant appeals.

The plaintiff formerly resided in Iowa; the defendant, a real estate agent, resides in Dawes county, Nebraska. October 2, 1906, Shell Woodard, a resident of Iowa, accompanied the plaintiff and one or more other persons from Iowa to Nebraska and introduced them to the defendant. Mr. Hutton, while exhibiting several tracts of land to the land seekers, represented to the plaintiff that a certain quarter section was not subject to entry because of a homestead filing thereon, but that he (Hutton) would secure a relinquishment of that filing for \$2 an acre, or \$320 all told. The defendant denies making the statement, but the proof, including his own letters, contradicts him. Hutton prepared a written contract, which was signed by both parties, by the terms whereof he agreed, for the consideration of \$320, to secure for the plaintiff "homestead papers in legal form on the southeast quarter of section 18," etc. The plaintiff paid Mr. Hutton \$65 in cash, gave two promissory notes for \$80 each, and agreed to pay the remaining \$95 shortly after returning home. The plaintiff then went before a United States commissioner and executed a proper affidavit for a homestead entry of the quarter section, and it was transmitted by Mr. Hutton to the land office. Subsequently the plaintiff paid the \$95 to Shell Woodard's father. The defendant prayed for a judgment on the notes and for no other affirmative relief.

The court instructed the jury, in substance, that the burden was on the plaintiff to prove by a preponderance of the evidence that the false representations were made by the defendant and relied on by the plaintiff, and, if made, the plaintiff should recover the \$65, with interest; and, if they further found by a preponderance of the evidence that Woodard had authority to collect the \$95, the plaintiff should recover that further sum, with interest;

but, on the other hand, if the plaintiff failed to establish his right to recover, they should return a verdict for the defendant for the sum of the notes, plus interest thereon.

It is first complained that the plaintiff's right of action was upon the written contract, and that certain allegations in the reply were a departure therefrom. The action is not upon the written contract, but upon the implied promise of the defendant to return the money which he secured by fraud and without consideration.

It was admitted during the trial that the quarter section was subject to entry at the time the contract was made. There was therefore no consideration for an agreement to pay for a relinquishment, nor to support the payment when made. Money thus paid may be recovered back in an action of this character. *Rogers v. Walsh & Putnam*, 12 Neb. 28; *Warder, Bushnell & Glessner Co. v. Myers*, 70 Neb. 15. The plaintiff was not required, as a condition precedent to prosecuting this action, to rescind the contract. The defendant did not own the land, was not the government's agent, and gave the plaintiff nothing except information concerning the location of the real estate.

The defendant is in no position to assert that, because the government records were open to inspection, the representation was immaterial. It is enough that the plaintiff believed the statement, that inquiry was necessary to discover the truth, and that he parted with his money on the strength of the representation. Nor does the defendant's liability depend upon his knowledge that the representations were false. *Gerner v. Mosher*, 58 Neb. 135; *Omaha E. L. & P. Co. v. Union Fuel Co.*, 88 Neb. 423.

The defendant argues that there is no proof of Woodard's authority to collect the \$95. There is no direct proof of the fact; but there is evidence tending to prove that there was an agreement between the defendant and each of the Woodards, by the terms of which they divided profits made from customers sent to the defendant or by him to either of them. It is true that Shell Woodard, and

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not his father, who collected the \$95, accompanied the plaintiff to the defendant's office; but it is also true that the elder Woodard had possession of the notes from November, 1906, until his death, and that the defendant, in suing for the balance due him on the contract, did not include the \$95. Omitting this item from his demand was a practical admission by the defendant that it had been satisfied by the payment to Woodard, and this admission included a concession that Woodard had authority to collect. Agency, like any other condition or fact, may be established by circumstantial evidence. *Stewart v. Cowles*, 67 Minn. 184; 31 Cyc. 1661. We think there is sufficient evidence to justify submitting the fact to a jury.

The defendant's contention that he should be paid the reasonable value of his services as a locator cannot be considered, because no demand is made therefor. The defendant relies solely upon his contract, which makes no reference to such services.

Some irrelevant evidence was received during the trial, but it could not have misled the jury. The defendant's liability is plain, the only doubtful question being Woodard's agency, and upon that issue the irrelevant evidence could not have influenced the verdict.

The judgment of the district court, therefore, is

AFFIRMED.

FURNAS COUNTY, APPELLANT, v. CHARLES M. EVANS ET AL.,
APPELLEES.

FILED OCTOBER 6, 1911. No. 16,544.

1. **Counties and County Officers: COUNTY TREASURER: LIABILITY ON BOND.** A county treasurer who receives money or anything of value in consideration for the use of the county funds is liable upon his bond for that profit.
2. ———: ———: **ACTION ON BOND: PETITION: SUFFICIENCY.** In an action upon a county treasurer's official bond, a petition states

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facts sufficient to constitute a cause of action if the pleading, considered as a whole, in substance charges that subsequent to the enactment of chapter 50, laws 1891, the treasurer received interest upon county funds deposited by him in various banks, and did not account therefor.

APPEAL from the district court for Furnas county:
ROBERT C. ORR, JUDGE. *Reversed.*

R. J. Harper and Adams & Adams, for appellant.

Perry, Lambe & Butler, W. S. Morlan and J. F. Fults,
contra.

ROOT, J.

This is an action upon the official bond of a former treasurer of Furnas county. The defendants' general demurrer to the petition was sustained, and the plaintiff appeals.

The pleader alleged the plaintiff's corporate character; that the defendant Evans was elected as county treasurer for the years 1902 and 1903, and executed the bond in suit, which is conditioned as follows: "The condition of the above obligation is that, whereas the above bound C. M. Evans has been elected county treasurer in and for Furnas county, Nebraska: Now if said C. M. Evans shall render a true account of his office, and of the doings therein, to the proper authority, when required thereby or by law, and shall promptly pay over to the person or officers entitled thereto all moneys which may come into his hands by virtue of his said office, and shall faithfully account for all the balances of money remaining in his hands at the termination of his office, and shall hereafter exercise all reasonable diligence and care in the preservation and lawful disposal of all moneys, books, papers and sureties or other property appertaining to his said office and deliver them to his successor, or to any person authorized to receive the same, and he shall faithfully and impartially without fear, favor, fraud or oppression, dis-

charge all other duties now or hereafter required of his office by law, then this bond to be void, otherwise in full force."

The plaintiff also alleged that the bond was accepted and approved and the treasurer inducted into office. The pleader also charges: "That during the term aforesaid for which the said defendant had been elected to said office, pursuant to the laws of the state of Nebraska, many banks in said county, among which were the Citizens State Bank, First State Bank, Wilsonville State Bank, applied to the county commissioners of the plaintiff county for the privilege of becoming depositories of the county's funds, and each and all of said banks entered into obligations which were approved by the county commissioners, the amounts of said obligations and dates of approval being as shown by exhibit A, hereto attached and made a part of this petition, whereby they became depositories of said county, the plaintiff herein, from the date of the approval of said bonds, and entitled to receive on deposit from the said county treasurer the surplus funds of the said county, thereby obligating themselves and agreeing to pay as interest for the privilege of keeping said moneys interest at a rate of not less than 3 per cent. per annum, to be computed on the average daily balances of such deposits, for each quarter of the year, and to be paid to said defendant Charles M. Evans, as county treasurer, and as agent of the plaintiff county, quarterly.

"The plaintiff further alleges and represents to the court: That, by virtue of the foregoing premises, the defendant Charles M. Evans, from the commencement of his said term of office and during the whole of said term, deposited large sums of the county's money in the above mentioned banks, and in other banks, the names of which and the amounts deposited therein being unknown to this plaintiff, and the plaintiff charges the fact to be that the average daily balances for the term so deposited by him in said depository banks and other banks were as follows:

For the first quarter of the year 1902, ending March 31, \$30,831; for the second quarter of the year, ending June 30, \$36,509; for the third quarter, ending September 30, \$31,767; for the fourth quarter of said year, \$26,066; for the first quarter of the year 1903, \$28,472; for the second quarter, \$34,592; for the third quarter of the year 1903, \$26,964; for the fourth and last quarter, \$29,685; that the amount of interest so earned and the reasonable value thereof, by reason of said deposits in the various banks wherein it was kept during his said term of office, was the sum of \$1,836.65. Of said interest so earned, the said defendant has accounted for and paid to the county, plaintiff herein, and received credit for, the sum of \$540, and no more, thereby leaving a balance due plaintiff from said defendant in the sum of \$1,296.65.

"The plaintiff alleges that the said defendant, Charles M. Evans, in violation of his oath of office, of his bond, and of the laws of the state of Nebraska, regulating the safe keeping, the depositing, the management and control of the county's funds, has carelessly, negligently and wilfully failed and refused to account to this plaintiff for the amount so received and collected by him, and which he was in duty bound to collect, or he has collected the same and converted it to his own use, wrongfully and wilfully, to the plaintiff's damage in the amount above stated, and, although often requested, still refuses to pay the same to this plaintiff."

During the hearing on the demurrer, counsel for the plaintiff admitted in open court "that the defendant Charles M. Evans, as county treasurer, duly deposited and kept in the depositories mentioned in the plaintiff's petition the full amount as prescribed by law that he might deposit under the bonds set forth in said petition, and that on the deposits as made he collected and accounted for all interest earned on the amounts of money so deposited up to the amount prescribed by law that he ought to have deposited under the bonds as filed and approved by the county board." The transcript does not

contain a copy of the exhibits which are part of the petition, but the admissions in the defendants' briefs demonstrate that the penalty in all of the depository bonds aggregated but \$20,000; \$10,000, therefore, was the maximum amount that could lawfully have been deposited in those banks at any one time. It follows from a consideration of the petition that the treasurer's deposits at times were \$26,500 in excess of the amount he could lawfully have deposited, unless he was within the exception noted in *Hamilton County v. Aurora Nat. Bank*, 88 Neb. 280. The treasurer accounted to the county for interest on not to exceed \$10,000.

The allegations in the seventh paragraph of the petition that the treasurer "has carelessly, negligently and wilfully failed and refused to account to this plaintiff for the amount so received and collected by him, and which he was in duty bound to collect, or he has collected the same and converted it to his own use, wrongfully and wilfully, to the plaintiff's damage in the amount above stated," etc., are indefinite, but when taken in connection with the other parts of the petition, as against a general demurrer, should be construed at least to charge that the treasurer collected \$1,296.65 as interest on these deposits, and did not account therefor, but converted it to his own use. Since the code does not permit a demurrer for uncertainty, a litigant's remedy for alternative or otherwise indefinite statements is by motion. The defendants elected to test the pleading by demurring thereto, and, having thereby admitted the verity of all of the allegations of fact well pleaded therein, must abide the legal consequences flowing therefrom.

During all of the time the treasurer held his office, section 21, art. III, ch. 18, Comp. St. 1901, was in force, and by its terms the treasurer and his bondsmen were held for any profit realized by him for the unlawful use of the county funds. Section 21, *supra*, in concise terms forbids the treasurer loaning, depositing or otherwise using or disposing of those funds, except by placing them

For the first quarter of the year 1902, ending March 31, \$30,831; for the second quarter of the year, ending June 30, \$36,509; for the third quarter, ending September 30, \$31,767; for the fourth quarter of said year, \$26,066; for the first quarter of the year 1903, \$28,472; for the second quarter, \$34,592; for the third quarter of the year 1903, \$26,964; for the fourth and last quarter, \$29,685; that the amount of interest so earned and the reasonable value thereof, by reason of said deposits in the various banks wherein it was kept during his said term of office, was the sum of \$1,836.65. Of said interest so earned, the said defendant has accounted for and paid to the county, plaintiff herein, and received credit for, the sum of \$540, and no more, thereby leaving a balance due plaintiff from said defendant in the sum of \$1,296.65.

"The plaintiff alleges that the said defendant, Charles M. Evans, in violation of his oath of office, of his bond, and of the laws of the state of Nebraska, regulating the safe keeping, the depositing, the management and control of the county's funds, has carelessly, negligently and wilfully failed and refused to account to this plaintiff for the amount so received and collected by him, and which he was in duty bound to collect, or he has collected the same and converted it to his own use, wrongfully and wilfully, to the plaintiff's damage in the amount above stated, and, although often requested, still refuses to pay the same to this plaintiff."

During the hearing on the demurrer, counsel for the plaintiff admitted in open court "that the defendant Charles M. Evans, as county treasurer, duly deposited and kept in the depositories mentioned in the plaintiff's petition the full amount as prescribed by law that he might deposit under the bonds set forth in said petition, and that on the deposits as made he collected and accounted for all interest earned on the amounts of money so deposited up to the amount prescribed by law that he ought to have deposited under the bonds as filed and approved by the county board." The transcript does not

contain a copy of the exhibits which are part of the petition, but the admissions in the defendants' briefs demonstrate that the penalty in all of the depository bonds aggregated but \$20,000; \$10,000, therefore, was the maximum amount that could lawfully have been deposited in those banks at any one time. It follows from a consideration of the petition that the treasurer's deposits at times were \$26,500 in excess of the amount he could lawfully have deposited, unless he was within the exception noted in *Hamilton County v. Aurora Nat. Bank*, 88 Neb. 280. The treasurer accounted to the county for interest on not to exceed \$10,000.

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During all of the time the treasurer held his office, section 21, art. III, ch. 18, Comp. St. 1901, was in force, and by its terms the treasurer and his bondsmen were held for any profit realized by him for the unlawful use of the county funds. Section 21, *supra*, in concise terms forbids the treasurer loaning, depositing or otherwise using or disposing of those funds, except by placing them

in a depository or by paying warrants lawfully drawn thereon. *Hamilton County v. Aurora Nat. Bank*, 88 Neb. 280, construes this section to contain an exception which permits the treasurer to lawfully deposit money in non-depository banks in case the maximum deposits have been made in the depositories, if the place provided by the county for safe keeping its funds is insecure, and the treasurer in good faith deposits the surplus funds without directly or indirectly receiving any profit therefrom. In this case the treasurer is not within the exception established by the *Hamilton County* case, *supra*.

It is argued that the statute does not hold the treasurer responsible for interest, but for profits realized for the use of the county funds; that "profit is the acquisition beyond expenditure, excess of value received for producing, keeping or selling over cost," and that the plaintiff does not allege that the treasurer profited by the transaction. In other words, that he may have been compelled to make good out of his private funds some of the principal of the deposits, and therefore it does not appear that he profited by the transaction pleaded. We do not think it necessary to consider abstract definitions of the word profit. The statute contains satisfactory internal evidence that the legislature intended the word to describe interest collected by the treasurer. "The making of profit, directly or indirectly, by the county treasurer out of any money in the county treasury belonging to the county, the custody of which the treasurer is charged with, by *loaning* or depositing or otherwise using or depositing the same in any manner, * * * except * * * shall be deemed guilty of felony, * * * and * * * shall also be liable under and upon his official bond for all profits realized from *such* unlawful using of such funds." Comp. St. 1901, ch. 18, art. III, sec. 21. Plainly the unlawful use may be accomplished by loaning the funds, depositing them, or by any use whereby, directly or indirectly, the treasurer profits by the transaction. If, as charged in the petition, the treas-

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urer did collect and convert to his own use interest for the use of the plaintiff's funds, the defendants are liable to the plaintiff for that profit. The petition states a cause of action, and the district court erred in sustaining the demurrer.

The judgment of the district court therefore is reversed and the cause remanded for further proceedings.

REVERSED.

JAMES H. HILL, APPELLEE, v. JOHN W. HILL, JR., TRUSTEE,
APPELLANT; SARAH E. HILL ET AL., APPELLEES.

FILED OCTOBER 6, 1911. No. 17,079.

1. **Wills: CONSTRUCTION:** "HEIRS." A devise to the testator's "lawful heirs" should be construed as referring to those who are such at the time of the testator's death, unless a different intent is plainly manifested by the will.
2. ———: ———: **VESTED AND CONTINGENT DEVISES.** If a future time for the enjoyment of a devise is fixed by the will of a testator, the devise will be vested or contingent according as, upon a consideration of the entire will in the light of the circumstances surrounding the testator at the time it was made, it is evident he intended to annex the time to the enjoyment of the devise, or to the gift of it.
3. **Trusts: CONSTRUCTION.** A bequest to A to hold personal property, or a devise to hold the title to real estate, in trust for B, but with no duties to perform and no estate in remainder or gift over, vests in the trustee a naked, legal title, and none other.
4. ———: **ENFORCEMENT: EQUITY.** In that event, if B is of full age and competent, not a spendthrift, and there is no restraint upon his right to sell or incumber his estate, a court of equity at his suit may lawfully require A to yield possession and control of the estate to B, and may compel the trustee to convey the estate to whomsoever B directs.
5. ———: **APPEAL: DECREE: HARMLESS ERROR.** If the court in such an action requires the trustee to convey to B, the error, if any, is without prejudice to A.

6. **WILLS: CONSTRUCTION.** It is the duty of the courts in construing a will to carry into effect the true intent of the testator, so far as that intent can be collected from the whole instrument, if not inconsistent with the rules of law; but the law imputes to the testator a knowledge of those rules, and he will be presumed to have executed his will with an understanding that the objects of his bounty may demand their portions in accordance therewith.
7. **TRUSTS: ENFORCEMENT: EQUITY.** An order by a county court directing an administrator with the will annexed to deliver to a testamentary trustee possession of all property affected by that trust, but in no manner defining the rights of the *cestuis que trustent*, presents no bar to an action in equity by the *cestuis que trustent* against the trustee to compel him to deliver possession of the property, and in effect to dissolve the trust.

APPEAL from the district court for Douglas county:
ABRAHAM L. SUTTON, JUDGE. *Affirmed.*

Frank T. Ransom and Ellery H. Westerfield, for appellant.

O'Harra & O'Harra, Isaac E. Congdon and Henry E. Maxwell, contra.

ROOT, J.

This is an action to require a trustee to pay to the plaintiff the net income of his alleged share of an estate; those defendants, who also contend that they are beneficial owners of shares of that estate, pray that the trustee be required to convey the entire estate to the equitable owners thereof. The cross-complainants prevailed, and the trustee appeals.

The instrument involved in this controversy is the last will and testament of Lew W. Hill, deceased, and is as follows: "I, Lew W. Hill, hereby make and declare this my last will: I will and bequeath to my nephew, John W. Hill, Jr., in trust for my lawful heirs, all my estate, both real and personal, of every kind and nature, to be held by said trustee for the term of five years, and to be

distributed among my lawful heirs at the end of such period. Dated this 13th day of July, 1908."

The testator, a wealthy bachelor residing in Omaha, executed the will during his last illness and three days before his death. After the estate was administered, the county court ordered the administrator with the will annexed to deliver to himself as trustee all of the estate, and he complied with the order. At the time the will was executed, Lew W. Hill's heirs presumptive were the plaintiff, then 73 years of age, the defendant John W. Hill, Sr., then 70 years of age, and two sons and a daughter, sole children of the testator's deceased sister, Mary Wilson, each of whom was past 30 years of age. All of those heirs survived the testator, and were parties to this action. The niece died after this suit was commenced, and the action has been revived in the name of her legal representatives.

The evidence is meager, but it appears therefrom that all of the testator's heirs were, and that the survivors are, competent to transact business, and that none of them are spendthrifts. The plaintiff is a man of but little means, and works at his trade as a painter. There is no proof to so much as suggest that the testator entertained unkind feelings towards any of his relatives.

If we understand the argument in the trustee's brief, his contention is that the will devises the estate to a class to be ascertained five years subsequent to the testator's death, at which time, and not before, the devisees, other than the trustee, take a vested estate; that preceding this event the trustee has the sole right to manage and control the estate; that the decree of the county court is a bar to any action having for its purpose the diversion of that estate from the possession of the trustee, and that in any event an action in equity will not lie.

We discover nothing in the will to suggest that the devisees did not take a vested present estate. The testator does not say that the devise is to those of his heirs who shall survive five years subsequent to his decease, nor

does he by any condition, precedent or subsequent; restrict the distribution of his estate to his heirs in being at that time. The will contains but one sentence, and, by the identical words which devise a legal estate to the trustee, an equitable estate is devised to the testator's lawful heirs.

The general rule seems to obtain that a devise or bequest to "heirs at law" or "heirs" of a testator should be construed as referring to those who are such at the time of the testator's death, unless a different intent is plainly manifested by the will. *Abbott v. Bradstreet*, 3 Allen (Mass.) 587; *Minot v. Tappan*, 122 Mass. 535; *Dove v. Torr*, 128 Mass. 38; *Cummings v. Cummings*, 146 Mass. 501; *Boston Safe Deposit & Trust Co. v. Parker*, 197 Mass. 70; *Allison v. Allison's Exr's*, 101 Va. 537; *In re Tucker's Will*, 63 Vt. 104.

No special significance should be given to the fact that the testator did not name his heirs presumptive; the document evidences either extreme haste in preparation or a desire for such brevity that details were sacrificed to comprehensive terms. There is nothing in the record, other than the will, to suggest that the testator did not intend to permit his elder brother, who had outlived the scriptural span of life, to receive a part of the testator's estate, unless that brother survived his seventy-eighth birthday. The estate is of such magnitude that it is not necessary to take from the portion of one devisee for the benefit of another in order that the latter may be supported in reasonable comfort upon the income from the devise. There is nothing in the terms of the will or in the circumstances of the case to convince us that the testator did not intend to benefit every person who at the time of the testator's death was one of his heirs. It is argued, however, that time was annexed to the substance of the gift, and therefore the estate will only vest in those of the class who survive at the time fixed for distribution.

We may safely accept the rule quoted by the trustee from 2 Williams, Executors (7th Am. ed.) p. 515: "When

a future time for the payment of the legacy is defined by the will, the legacy will be vested or contingent, according as, upon construing the will, it appears whether the testator meant to annex the time to the payment of the legacy, or to the gift of it." So, if the gift be independent of the direction to pay, the estate will ordinarily vest. As we have seen, the gifts in the instant case do not depend upon directions to pay or transfer at a future date, but are given by direct language in the present tense in a clause in nowise dependent upon the directions to distribute. The estates therefore are not contingent, but certain. 2 Jarman (Sweet) Wills (6th ed.) p. 1358; Theobald, Wills, p. 583; Kales, Future Interests, sec. 210; *Ruffin v. Farmer, Adm'r*, 72 Ill. 615; *Marsh v. Wheeler*, 2 Edw. Ch. (N. Y.) *156; *Goddard v. Johnson*, 31 Mass. 352; *Andrews v. Russell*, 127 Ala. 195.

The trustee contends that in any event he is entitled to the possession and control of the estate for five years subsequent to the testator's death, and that in the meantime none of the devisees should receive any part of the rents and profits growing out of the estate. There is some inconsistency in the attitude of the devisees; the plaintiff announces in his petition that he is content to receive a third of the net increase of the estate; the defendant, John W. Hill, Sr., in substance states in his answer that he is willing the trustee should continue in possession of the trust estate; whereas the nephews and the niece, who by representation contend for one-third of the estate, insist that the trust shall be dissolved and the entire estate delivered to the *cestuis que trustent*. The trustee is the son of John W. Hill, Sr., and it is more than probable that no serious conflict will arise between them, should it be determined that the decree of the district court should be affirmed. The plaintiff, while contending in his petition for the net income of his portion of the estate, in this court defends the decree of the district court. It will be observed that the will vests the trustee with no power and defines no duty which he is to per-

form, save that he is to "hold" the estate. It may be suggested that he is charged with the duty of distributing the estate, but such construction must be by implication. The major part of the estate consists of farms and city lots; there is no direction to the trustee to convert this real estate into cash and distribute the proceeds. The distributive shares of the personal estate may readily be paid therefrom, and the devisees will take the real estate as tenants in common. The trust created, therefore, was passive, vesting in the trustee a dry, naked title. The effect being, so far as the real estate is concerned, if the statute of uses were part of the law of this state, to vest immediately the legal title as well as the beneficial use in the *cestuis que trustent*. 1 Perry, Trusts (6th ed.) sec. 298; 2 Jarman (Sweet) Wills (6th ed.) p. 1813; *In re Jacob's Will*, 29 Beav. (Eng.) 402; *Gosling v. Gosling*, Johns. (Eng.) 265; *Woolley v. Preston*, 82 Ky. 415; *Henderson v. Adams*, 15 Utah, 30; *Wellford v. Snyder*, 137 U. S. 521; *Martin v. Fort*, 27 C. C. A. 428. But it is said this principle does not apply because this court, in *Farmers & Merchants Ins. Co. v. Jensen*, 58 Neb. 522, held that the statute of uses had not been adopted as part of our system of conveyancing. Granting this to be true, and giving the cited opinion the scope contended for by the trustee, the law should be considered as though parliament had not enacted the statute, 27 Henry VIII, ch. 10. In that event, the power of the chancellor to compel the trustee to account for, and, if he had no duty other than to hold the legal title to the estate, to require him to deliver over, that estate to his *cestuis que trustent*, would be unquestioned. Lewin, Trusts (11th ed.) pp. 16, 849.

Section 9, art. VI of the constitution, among other things, provides that the district courts shall have chancery jurisdiction. The district court, therefore, had authority in the premises. In the instant case the testator did not provide that the devisees should not alienate their interests in his estate; did not provide that upon a contingency any portion of the estate should go over by way of an executory devise or otherwise; did not direct the

trustee to lease the land or collect the rents and profits; did not direct him to pay taxes or insure the buildings, loan money, collect the principal or interest, due or to become due, upon the certificates of deposit, promissory notes or land contracts, which form the bulk of the personal estate. The trustee is not charged with the duty of paying any of the heirs' debts nor is he required to pay for their support, nor to expend money for any purpose whatsoever, nor to distribute the estate. The *cestuis que trustent*, therefore, by long-established and well-known rules of law, are entitled to not only the enjoyment, but the immediate possession, of their portions of the estate. *Atkins v. Atkins*, 70 Vt. 565; *Jasper v. Maxwell*, 1 Dev. Eq. (N. Car.) 361; *Rector v. Dalby*, 98 Mo. App. 189, 71 S. W. 1078; *Rife v. Geyer*, 59 Pa. St. 393, 98 Am. Dec. 351; 3 Pomeroy, Equity Jurisprudence (3d ed.) sec. 988. The *cestuis que trustent* may also lawfully require the trustee to execute such conveyances of the legal estate as they may direct. 2 Perry, Trusts (6th ed.) sec. 520. It may be that the district court would have more nearly conformed to the law, had it not ordered the trustee to convey to the various *cestuis que trustent* the legal title to the property in controversy, but had directed him to convey to third persons during the five years, if so requested by the beneficiaries. If there is any error in this regard, it is without prejudice.

It is argued that the district court ignored the expressed intent of the testator that his estate should not be distributed for five years, and thereby the will was destroyed. But the law imputes to the testator a knowledge of its rules; he will be presumed to have known that it was optional with the devisees to permit the trustee to exercise dominion over the estate or to call upon him to convey, and that they would have a lawful right to call a court of equity to their aid to compel him to deliver possession of the estate or to convey the legal title. The district court therefore did not disregard the testator's intent.

The contention that the plaintiff had an adequate remedy at law by an action in replevin or of conversion for his portion of the personal estate, and by an action in ejectment for his share of the real estate, is not well taken. Having held that the statute of uses is not in force in Nebraska, a court of equity is the proper forum to call the trustee to account and to make such orders as justice and equity demand with respect to the trust estate. 2 Story, Equity Jurisprudence (13th ed.) sec. 1058.

But it is said that the decree of the county court is a bar to this action. The county court did not determine or attempt to decide that the trustee was seized of any particular estate in the property of the deceased, or to adjudicate the rights of the *cestuis que trustent*. The administrator with the will annexed was permitted to exonerate himself and his bondsmen from further liability by delivering the estate to himself as trustee. The fact that the trustee, at the suggestion of the parties interested, executed a bond to the county judge and to his successors in office to account for the choses in action and the personal estate of the deceased at the end of the five year period was not a determination of the rights of any devisee under the will. Section 16, art. VI of the constitution, withholds from the county courts jurisdiction to determine actions where the title to real estate is sought to be recovered or is drawn in question; and while that court might lawfully make an order upon proper notice, which when obeyed by the administrator with the will annexed would protect him in delivering possession of the real estate owned by the testator at the time of his decease, it would not estop those devisees from litigating their rights in the district court in a proper action with respect to that title. The county court did not attempt to construe the trust, so far as it affected the personal estate, and the decree of the district court, in the instant case, reserved for further determination the distribution of that property. The construction given by this court to

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the trust will, however, control the parties, not only in the disposition of the real, but also with respect to the personal, estate.

Finding no prejudicial error in the record, the decree of the district court is

AFFIRMED.

WILLIAM WERGER, APPELLEE, v. JOHN B. STEFFENS,
APPELLANT.

FILED OCTOBER 6, 1911. No. 16,504.

Damages: EVIDENCE. In a suit for injury to realty and for conversion of personalty transferred therewith by defendant to plaintiff, it is error to permit the latter, over the former's objections, to show the entire damage by answering a question calling for the difference in value of the farm before and after the injury and conversion.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Reversed.*

George W. Berge, for appellant.

J. C. McNerney and R. D. Stearns, contra.

ROSE, J.

Plaintiff bought from defendant an improved farm in Lancaster county and went into possession under a warranty deed. This is a suit to recover from defendant damages for digging up and carrying away rosebushes, tearing down and removing fences, detaching clockshelves and other fixtures from the buildings, and converting to his own use a pile of fence posts, a roll of wire, a few movable hen nests, a lot of loose lumber and other property. The petition states that defendant sold the converted personalty to plaintiff with the farm, and that he injured the realty after the sale. Under the pleadings

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plaintiff was required to make proof of the damages sustained and of defendant's liability. The jury rendered a verdict in his favor for \$700, and from a judgment for that sum defendant has appealed.

As a witness in his own behalf plaintiff was asked this question: "Well, now will you say, if you know, what was the difference in value of that farm as you bought it with all those various things on it that you say the defendant had removed prior to or immediately following his deed-ing it to you and the condition of the farm at the time those things were removed by the defendant; what is the difference in value, if any?" Over the objections of defendant it was answered as follows: "I should judge for my part somewheres like \$700 or \$800. It looked all of that to me bad, all of that." The overruling of the objections is assigned as error, and the answer of the witness is the only evidence of the amount of damages sustained. A considerable portion of the property in controversy was personalty. The measure of damages for the conversion of chattels is their market value at the time of the conversion. This value can only "be properly ascertained by the testimony of witnesses possessed of sufficient information to enable them to give intelligent opinions upon the subject." *Peckinbaugh v. Quillin*, 12 Neb. 586. To permit the witness, in proving the damages for the loss of the personalty, to state the difference in the value of the farm before and after the conversion is, of course, erroneous. The question was not in proper form, had it related alone to realty. The answer quoted being the only proof of the value of the converted chattels, was the error prejudicial to defendant? In testifying, the witness had described to some extent the personal property in controversy, but in a number of instances he did not pretend to give the quantity or quality with any degree of accuracy. He did not testify to the value of any separate item or state that he knew the value thereof. He did testify, however, that he had lived on a farm for 40 years, but when asked, "You know something about the value of con-

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veniences on the farm, do you?" he answered, "I can tell a good-looking farm from a poor one." There is no better evidence of his qualifications to testify to the value of the converted personalty than that mentioned. In addition, most of the witnesses who heard the conversation between plaintiff and defendant in relation to the property purchased testified to statements indicating that plaintiff bought nothing but the real estate and what was attached to it. On the face of the record the error was clearly prejudicial. A similar mistake was made in the charge to the jury and should not recur in the further proceedings.

REVERSED AND REMANDED.

HERBERT M. ANDERSON ET AL., APPELLANTS, V. R. C.
NOLEMAN ET AL., APPELLEES.

FILED OCTOBER 6, 1911. No. 16,514.

Evidence. Where the evidence relating to an issue of fact in an equity case is in direct conflict, the finding should be in favor of the party whose proofs are the more convincing, after all of the competent testimony and the credibility of the witnesses have been considered.

APPEAL from the district court for Box Butte county:
JAMES J. HARRINGTON, JUDGE. *Affirmed.*

William Mitchell and Eugene Burton, for appellants.

Boyd & Barker, contra.

ROSE, J.

This is an action to quiet title to a quarter section of land in Box Butte county. The district court rendered a decree in favor of defendants, and plaintiffs have appealed.

Plaintiff Herbert M. Anderson became the patentee January 13, 1894. To secure a 200-dollar note, he and his wife had mortgaged their interest in the land to the Bank of Commerce of Grand Island May 19, 1893, and subsequently Daniel Richey by assignment became the owner of the security. Anderson neither paid the amount due on the note nor the taxes levied against the land. At private tax sale T. M. Lawler purchased the property from the county treasurer, and commenced a suit to foreclose his tax lien October 1, 1903. By cross-petition therein, Richey demanded a foreclosure of his mortgage. Both liens were foreclosed; the sheriff selling the land to R. C. Noleman, July 12, 1904.

Anderson alleged and offered proof tending to show, in substance, these facts: He furnished Noleman \$400, and borrowed from him \$161. With these sums Noleman purchased the land at sheriff's sale in his own name for the benefit of Anderson, under an agreement to reconvey the title upon receiving payment of his loan of \$161. Afterward Anderson paid the amount due, and Noleman and wife gave him a quitclaim deed November 15, 1905, which he immediately offered for record, but which, for want of an acknowledgment, was not recorded. December 7, 1904, it was returned to and acknowledged by grantors and delivered to Anderson, who, without having it recorded, deposited it in a trunk in his house in Box Butte county. Before he had time to record it he was arrested for cattle-stealing and taken to Cheyenne county for trial, where he remained until imprisoned in the penitentiary for that offense. During his imprisonment, between December 10 and December 24, 1904, Noleman went to Anderson's house and procured the deed, saying to S. H. Wirts, the person in charge, that it was in Anderson's trunk. Before the latter date Noleman obtained from Anderson's father, Ole K. Anderson, a quitclaim deed to the land, stating it had been deeded to him after the sheriff's sale, and promising to act as attorney for the son in the prosecution for cattle-stealing. March 23, 1905, Noleman and

wife executed and delivered to W. P. Miles, who was also attorney for the defendant in the criminal prosecution, a quitclaim deed to an undivided half of the land. Later both of the attorneys conveyed their interests to defendant George W. Zoble. On proof tending to show the facts to be as thus narrated, plaintiffs contend that Anderson owns the land, that Noleman acquired no title or interest under the quitclaim deed executed by the senior Anderson, and that it and all of the subsequent conveyances described should be canceled.

In defense Zoble pleaded, and adduced evidence tending to show, that Ole K. Anderson, father of plaintiff Herbert M. Anderson, was the *bona fide* grantee in the unrecorded quitclaim deed executed and acknowledged by Noleman and wife December 7, 1904, and that they never made a conveyance to the son, who lost his title through the sheriff's sale.

On the issue of fact outlined, the evidence is conflicting. There is direct proof on both sides, but no principle of law or rule of evidence would be developed by a discussion of the testimony in detail. It would be unprofitable to extend the opinion to a length necessary for that purpose. The entire bill of exceptions, however, has been carefully considered with a view to arriving at the truth. The proofs in favor of the defense are the more convincing. Incidents outside of the direct evidence, when considered therewith, lead to a finding that the senior Anderson, and not his son, furnished the money received by Noleman, and that he was in fact Noleman's *bona fide* grantee. This conclusion is in harmony with the finding of the trial court. With the issue defined thus determined, other questions presented need not be considered.

The decree below is without error, and is

AFFIRMED.

LAURA ADLER, GUARDIAN, APPELLEE, V. ROYAL NEIGHBORS
OF AMERICA, APPELLANT.

FILED OCTOBER 6, 1911. No. 16,528.

Evidence: AGE: PRESUMPTIONS. It will be presumed a husband knows the age of his wife and is qualified to testify thereto, unless the contrary is shown, where they lived together 30 years.

APPEAL from the district court for Douglas county:
GEORGE A. DAY, JUDGE. *Affirmed.*

Benjamin D. Smith and Nelson C. Pratt, for appellant.

Weaver & Giller, contra.

ROSE, J.

This is a suit on a 1,000-dollar fraternal beneficiary certificate issued by defendant to Mari Schlank January 9, 1905. Assured died September 1, 1907. Plaintiff, Isadore Schlank, her son, is the beneficiary, and recovered a judgment for the full amount of the insurance and interest, amounting to \$1,116.65. Defendant has appealed.

The substance of the defense interposed is: Assured was over 45 years of age when she applied for membership, and was for that reason ineligible. She procured her insurance by falsely stating and warranting in her application that she was under the age limit. On these facts there is no liability on the part of defendant under its laws and the terms of its contract.

After the proofs had been adduced, each party requested a peremptory instruction, and the trial court directed a verdict in favor of plaintiff, thereby finding that assured did not misrepresent her age in her application for the purpose of procuring insurance. Each party having thus invited the judgment of the court on the contested issue of fact, the direction in plaintiff's favor has on appeal the same force as the verdict of a jury. *Dorsey v. Wellman*, 85 Neb. 262. The only question now for

determination, therefore, is the sufficiency of the evidence to sustain the judgment.

Assured's application for membership is in the record. It is dated December 17, 1904, and gives the date of her birth as July 15, 1860. The husband of assured testified that they lived together as husband and wife from 1876 to the time of her death, September 1, 1907, and raised a family of six children; that he knew how old she was when they were married, her mother having told him, and that assured was then 16; that she was born in 1860; that he did not know of the mother's death, but that, if living, she was in Austria. If assured was born in 1860, she was not 45 when she made her application, December 17, 1904. Defendant argues, however, that the testimony of the husband cannot be considered for the following reasons: His information came from assured's mother, whose death was not shown. His evidence was hearsay, and he had not qualified himself to testify to his wife's age. Under the rules of evidence announced in a former decision, a husband is presumptively competent to speak on that subject, and may do so, though his knowledge is founded on hearsay derived from family tradition. *Grand Lodge, A. O. U. W., v. Bartes*, 69 Neb. 636. In that it was held: "A wife who has lived for 20 years with her husband will be presumed to know his age and to be qualified to testify thereto, unless the contrary clearly appears from the record." In the present case it does not clearly appear that the husband was disqualified. If he told the truth, he had lived with his wife more than 30 years, and they had raised a family of six children. His statement that he knew how old she was when they were married, because her mother told him, does not require the rejection of his testimony that she was born in 1860. He made no statement sufficient to overcome the presumption that he knew his wife's age, nor does the record contain such proof. Under the principles announced in the case cited, the evidence is sufficient to sustain the judgment.

AFFIRMED.

AMERICAN SURETY COMPANY OF NEW YORK, APPELLANT,
v. CLYDE S. MUSSELMAN, APPELLEE.

FILED OCTOBER 6, 1911. No. 16,547.

1. **Trial: DIRECTING VERDICT.** Where the evidence is sufficient to sustain a verdict for plaintiff, but would not support a finding for the defendant, it is the duty of the trial court to relieve the case of all uncertainty by directing a verdict for the plaintiff.
2. **Principal and Surety: SURETY COMPANY: LIABILITY FOR PREMIUMS.** Evidence examined and referred to in the opinion *held* not sufficient to warrant the submission of the case to the jury.

APPEAL from the district court for Harlan county:
HARRY S. DUNGAN, JUDGE. *Reversed with directions.*

Montgomery & Hall, for appellant.

Thomas & Shelburn, contra.

FAWCETT, J.

On September 22, 1905, defendant, who had been appointed receiver for the firm of Gould Brothers, insolvent, made a written application to plaintiff for a surety bond for himself as such assignee. In the application he agreed to pay for such bond \$40, and a like sum on the 22d day of September in each year thereafter until plaintiff should be notified of its release as surety in the manner prescribed in such application. The bond was secured, approved, and defendant entered upon the discharge of his duties as such assignee. Defendant paid the first instalment of \$40, but failed and refused to pay the subsequent annual instalments. This action was brought to recover the instalments for the years 1906 and 1907.

The answer admits the execution of the bond, and denies all other allegations in plaintiff's petition. It further alleges that, within three months after his appointment as assignee, defendant purchased all of the accounts owing by Gould Brothers, thereby becoming the

sole creditor of such bankrupt firm, and immediately notified John Everson, who, it is alleged, was the attorney and agent for plaintiff, of what he had done, and that he did not desire any renewal or extension of the bond; that Everson then informed him that all liability on the bond had ceased, and that by purchasing the claims as stated defendant would not be required to obtain any discharge from the county court or to give plaintiff any further notice of the disposition of the matter; that defendant filed his final report as assignee in the county court within six months from the time he was appointed, and asked to be discharged; that by reason of the facts above stated there was no further liability on the bond, no object or reason for obtaining a discharge, and no necessity or consideration for the extension or renewal of the bond after the first year; that plaintiff had full knowledge of all of the facts recited, and that Everson informed the defendant that the bond would not be extended and defendant would not be required to pay any further sum by reason of the giving of said bond.

The reply is a general denial. Trial to the court and a jury: Verdict for defendant, and from a judgment thereon plaintiff appeals.

The written application of defendant, which contained the agreement on his part and upon which plaintiff issued the bond, contained the following: "Should the American Surety Company of New York, hereinafter called the surety, execute the bond hereinbefore applied for, the undersigned, hereinafter called the indemnitor, do undertake and agree:

"I. That the statements contained in the foregoing application are true.

"II. That the indemnitor will immediately pay the surety at its office, 100 Broadway, New York City, \$40 and \$40 on the 22 day of Sep. in each year hereafter and until the indemnitor shall serve upon the surety at said office competent written legal evidence of its discharge from such suretyship and all liability by reason thereof.

"III. That the indemnitor will perform all the conditions of said bond on the part of the indemnitor to be performed and will at all times indemnify and save the surety harmless from and against every claim," etc.

The theory upon which defendant seeks to escape payment of the premiums for the two years covered by plaintiff's petition, succinctly stated, is that, because defendant claimed to have purchased all of the outstanding debts of Gould Brothers, and made that statement to Mr. Everson, who was what was termed the local attorney of plaintiff at Alma, and because Mr. Everson took his word upon that point, and told him that by reason thereof it would not be necessary for him to pay any further premiums because there no longer existed any liability on the part of the surety, and that it was not necessary for him to obtain any discharge from the county court, plaintiff has waived its right to rely upon the stipulations in defendant's application. The trouble with this contention is that the testimony of the officers of plaintiff, which was received without objection, shows that Mr. Everson had no authority to make any such statements to defendant or to give him any such assurances; that in fact he had no authority beyond that of taking applications, forwarding them to the company, receiving from the company the bonds and delivering the same to the applicants; and Mr. Everson's own testimony is substantially to the same effect. An effort was made by defendant to show that he had prepared and filed with the county court a final report asking for his discharge, but it is not claimed, either by defendant or by Mr. Everson, who was acting as defendant's attorney in that behalf, that the county court ever acted upon such a report or entered any order discharging defendant as assignee and releasing his surety. That any such report was ever filed is left in grave doubt by the testimony of Mr. Miller, who was county judge at that time, that no such report was ever filed with or handed to him, and by the further fact, which strongly corroborates Mr.

Miller, that no such report, nor any record thereof, can be found among the files or upon the records of the court. It being conceded that no action was ever taken upon such a report by the court, and no order of discharge entered, the fact as to whether or not one was ever handed to the judge becomes immaterial. It is conceded by defendant that no attempt was ever made to furnish plaintiff with any written legal evidence of its discharge from its suretyship; hence the liability under the bond being a continuing liability, unlimited as to time, plaintiff had not, when this action was begun, been released therefrom. Sections 3525, 3526, Ann. St. 1911, provide for the final order of distribution and the manner in which an assignee and his sureties can be discharged. These statutory provisions were not complied with. We think it would be establishing a dangerous precedent to hold that an assignee of an insolvent estate, after obtaining a surety bond for the faithful discharge of his duties, may disregard the stipulations of his written agreement upon which the bond was obtained, and also the plain provisions of statute, and escape liability for the payment of the consideration due to the surety, with nothing more to support him than his naked statement to a local attorney and soliciting agent of the surety that he had purchased all of the outstanding claims against the bankrupt, and an assurance from such local attorney of the surety, who is also the assignee's counsel, that he need not comply with the terms of his contract with the surety and may ignore the plain provisions of the statute.

It is shown by the uncontradicted testimony of Mr. Potter, who is manager of plaintiff for Nebraska, that he had tried to get defendant to take the necessary legal steps to wind up the business of the assignment and obtain a legal discharge as assignee, and thus exonerate the surety, but that defendant failed and refused to do so. Some explanation of defendant's failure and refusal to properly close up the business and obtain his discharge is found in the testimony and letters of Mr. Everson that

a controversy had arisen between defendant, on one side, and the county judge and sheriff, on the other, over fees charged by the sheriff for a custodian of the bankrupt estate during some period of the proceedings.

No attempt was made to show to the county court by competent proof that defendant had purchased all the claims of the bankrupt. Defendant has never been discharged as assignee, and plaintiff is still liable upon his bond, in the event that his statement that he purchased all of the claims against the bankrupt should prove to be untrue. It is also liable for all costs that may be taxed against defendant as assignee upon his final account.

When both sides had rested, plaintiff moved for a directed verdict in its favor. The motion was overruled. In this ruling the district court erred.

Defendant relies upon *Fidelity & Deposit Co. v. Libby*, 72 Neb. 850, but we do not think that case is in point. There, a county treasurer and his deputy each furnished a surety company bond, executed by the plaintiff in that suit. The deputy made a written application for his bond, reciting that it was to be executed in consideration of an annual premium of \$50, payable annually in advance, which was to be paid by the treasurer, and the latter paid the first year's premium. At the expiration of the first year the deputy executed another official bond with personal sureties. This bond was approved by the board and an order entered reciting its approval and purporting to release and discharge the plaintiff from liability because of any future liability of the deputy. There was a judgment for defendant, which we affirmed, and rightly so. If, in the case at bar, defendant had ever obtained an order from the county court discharging plaintiff from further liability as his surety, we would unhesitatingly hold that no premiums could thereafter be collected by plaintiff.

As the record before us shows that there is no theory upon which defendant can ever escape liability for the premiums sued for in this action, it is our duty to end the

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litigation. The judgment of the district court is therefore reversed and the cause remanded, with directions to enter judgment for plaintiff in accordance with the prayer of its petition. *Robertson v. Brooks*, 65 Neb. 799.

REVERSED.

JOE MCKAY V. STATE OF NEBRASKA.

FILED OCTOBER 6, 1911. No. 16,975.

1. **Information: SUFFICIENCY.** An information is fatally defective if it charges the commission of the offense as subsequent to the date upon which the information is filed, or on an otherwise impossible date.
2. **Criminal Law: INFORMATION: AMENDMENT: TRIAL.** And in such a case it is error for the trial court, after permitting an amendment curing such defect, to require the accused, over his objection, to immediately proceed with the trial, without arraignment under and plea to the only information filed which stated an offense, without giving him the statutory time in which to plead thereto, and before a jury which had been impaneled under a void information.
3. ———: **FORMER JEOPARDY.** Where one accused of a felony is put upon trial under an information void upon its face, and, after trial begun, the information is amended and the trial proceeded with, *held*, that the accused is not thereby placed in jeopardy a second time.
4. ———: **PRIVATE COUNSEL.** Under the provisions of section 20, ch. 7, Comp. St. 1911, private counsel can only be permitted to assist in the prosecution of a person charged with the crime of felony, when procured by the county attorney, under the direction of the district court.
5. ———: ———. And an order by the district court, at the opening of the trial, that an attorney appearing as private prosecutor, under the employment of outside parties, is "permitted" to assist in the prosecution, is not a compliance with the statutory provision.
6. ———: ———. And when timely objection is made by the accused to the participation of such private prosecutor in the prosecution of the case, it is error to overrule such objection.

7. —: IRRELEVANT EVIDENCE. An accused in a criminal prosecution is entitled to a trial upon competent, relevant evidence; evidence which at least tends to establish his guilt or innocence; and evidence which has no such tendency, but which, if effective at all, could only serve to excite the minds and inflame the passions of the jury, should not be admitted.

ERROR to the district court for Antelope county: ANSON A. WELCH, JUDGE. *Reversed.*

William V. Allen, O. A. Williams and William L. Dowling, for plaintiff in error.

Grant G. Martin, Attorney General, and Frank E. Edgerton, contra.

FAWCETT, J.

The plaintiff in error, whom we will hereinafter designate as defendant, was convicted of murder in the first degree in the district court for Antelope county. A motion for a new trial was overruled and a sentence of life imprisonment imposed.

Defendant was prosecuted under an information filed April 28, 1910, which, omitting the formal part, alleged: "That Joe McKay, late of the county aforesaid, on the 7th day of December, A. D. 1910, in the county of Antelope, and the state of Nebraska, aforesaid, then and there being, in and upon one Albert Brown, then and there being, unlawfully, feloniously, purposely, and of his deliberate and premeditated malice, did make an assault with the intent then and there of him, the said Joe McKay, him, the said Albert Brown, unlawfully, feloniously, purposely, and of his deliberate and premeditated malice to kill and murder," etc. On the next day, defendant assailed this information with a motion to quash and a demurrer, both of which were overruled in the order named. Defendant was thereupon arraigned and pleaded not guilty, and the case was assigned for trial May 2, 1910. On May 2 the case was called for trial and the impaneling

of the jury begun. May 3 the jury was finally selected and sworn. The opening statements were made to the jury by counsel for the state and defendant, respectively. W. L. Staples, a witness for the state, was then called. After being interrogated as to his name, residence and official position, he was asked whether or not he had made a trip to Brunswick, whereupon the defendant objected to the introduction of any evidence upon the grounds: "(4) Because said complaint does not state an offense punishable by the laws of the state of Nebraska;" and "(6) because the information charges the commission of the crime on an impossible date, to wit, the 7th day of December, A. D. 1910, which has not yet arrived, and not on a date at any time prior to the filing of the information." Thereupon the court took a recess until the next morning, May 4, on which day, at the opening of court, the county attorney filed a motion for "leave of this court to correct the clerical error appearing near the end of line seven in the body of said information by striking out the numerals, to wit, 1910, there appearing, and inserting in their stead the numerals, to wit, 1909." Defendant objected to the proposed amendment upon the grounds that the defendant was prepared to go to trial on the information as it stood, but was wholly unprepared to proceed to trial under the proposed change in the information; that no copy of the information as it was proposed to be amended had been served upon defendant or his counsel, as required by statute; and that defendant had a statutory and constitutional right to 24 hours, after service upon him of the information as amended, within which to plead thereto. These objections were overruled. The court then, over defendant's objection, permitted the state to introduce the clerk of the court and the county attorney as witnesses for the purpose of laying the foundation for the state's motion to amend the information, at the conclusion of which the court sustained the motion to amend the information, and permitted the same to be amended by drawing a line

through the figures "1910" without obliterating them, and by placing over them the figures "1909," and ordered that the defendant be served with a copy of the information as corrected. The information was thereupon amended as directed by the court, reverified and refiled. The information as amended was served upon defendant at 8:49 in the evening of that day. On the next morning, May 5, on the convening of court, defendant tendered a plea in abatement or plea in bar "to the further proceeding of the court in this case," and also moved the court to exclude the Honorable M. F. Harrington, attorney at law, from participating in the prosecution of the case, upon the grounds that he had not been appointed by the court, as provided by statute, to assist in the prosecution; that he is not a deputy county attorney of Antelope county, or acting officially or under the solemnity of official oath in connection with the case; and, third, because his employment and payment are by private parties. All of defendant's objections and his motion were overruled, and at 10 o'clock A. M. of that day the jury were called into the box, and defendant's objection to the introduction of any evidence was then overruled, and, over the objection of defendant, the trial proceeded.

The objections of defendant to the information upon which he was arraigned, and under which the trial was entered upon, were well taken and should have been sustained. It charged the commission of the crime upon an impossible date, viz., a date nearly eight months in the future. Joyce, *Indictments*, sec. 319, announces the rule thus: "It is a general rule that an indictment is fatally defective if it charges the commission of the offense as subsequent to the date upon which the indictment is found, or on an otherwise impossible date." A large number of cases are cited by the author in support of the rule. Maxwell, *Criminal Procedure* (2d ed.) p. 67, says: "Time and place must be alleged as to every material fact in an indictment;" and on page 69 he says that time "should be stated with certainty. It must not be an impossible date,

such as a date after the indictment is found, and such defect is bad, even after verdict." In *State v. Smith*, 88 Ia. 178, it was held: "An indictment containing but one allegation as to the time of the commission of the offense, and stating that it was committed on a future day, is bad; the provisions of the code, sec. 4306, that no indictment is insufficient for want of an allegation of the time of any material fact when the time has once been stated, and of section 4305, that an indictment is good if it can be understood therefrom that the offense was committed some time prior to the finding of the indictment, being inapplicable." (55 N. W. 198.) In the opinion the court say: "This is not an omission to state the time when it had once been stated, but stating an impossible time. * * * It cannot be so understood from this indictment. It states but one date; a date not prior, but subsequent, to the finding of the indictment. * * * No indictment is sufficient that does not state the time at or about which the offense was committed, and, if it states an impossible time, it fails to charge an offense. We are in no doubt but that the first indictment was insufficient." In *Terrell v. State*, 165 Ind. 443, 2 L. R. A. n. s. 251, the supreme court of Indiana, in the opinion, and the annotator, in his notes, both exhaustively review the authorities on this point, which to our minds conclusively show that the original information was void, and hence did not state any offense.

Indeed, we do not understand the attorney general to contend that a conviction in this case could have been sustained under the information as originally filed, his contention throughout his brief being in support of the amendment permitted by the court. Upon that question we think the law must be taken as settled in this state. Section 436 of the criminal code provides: "And within twenty-four (24) hours after the filing of an indictment for felony, and in every other case on request, the clerk shall make and deliver to the sheriff, the defendant, or his counsel a copy of the indictment, and the sheriff on receiving

such copy shall serve the same upon the defendant; and no one shall be, without his assent, arraigned or called on to answer to any indictment until one day shall have elapsed, after receiving in person or by counsel, or having an opportunity to receive a copy of such indictment as aforesaid."

In *Zink v. State*, 34 Neb. 37, the syllabus holds: "(2) The right conferred upon the accused in a prosecution for a felony by section 436 of the criminal code, to a copy of the indictment or information, and one day to prepare for trial, is a substantial right, to deny which is error. (3) When an information for a felony is insufficient for want of a material averment, it is error for the trial court to permit an amendment supplying such deficiency, and require the accused, over his objection, to proceed with the trial immediately, refusing him a copy of the amended information, and the statutory time to plead thereto." In the opinion by POST, J., we have a very lucid discussion of this point. Among other things, it is said: "This right to be furnished with a copy of the indictment or information, and one day to prepare for trial, is a substantial right which cannot be denied the accused in a prosecution for a felony. It is no answer to say that the information as filed contains sufficient matter to indicate the crime and the person charged. We do not agree with the attorney general that there was no substantial defense the accused could make before the amendment that was not equally available after. He had before the amendment this most potent of defenses, that he was not charged with a crime and might object to being put on trial; or, if tried and found guilty, that a motion in arrest of judgment would be available." In *Barker v. State*, 54 Neb. 53, *Zink v. State* is cited and followed, and the same rule again announced. In *Zink v. State*, *supra*, it appears that the amendment was made before the trial was actually entered upon, but after it was made, and on the same day, the court refused defendant's demand for the statutory time in which to prepare for trial, and immediately put

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him upon trial without further arraignment or plea to the information as amended. The case at bar is stronger. Here the court permitted the amendment, and deprived defendant of his statutory rights, after the trial had been entered upon and the examination of witnesses had begun. We do not agree with counsel for defendant that a trial under the amended information would be placing defendant in jeopardy a second time. The original information being void upon its face was no information at all. Hence, nothing under it could in any manner place the defendant in jeopardy. The court did right in permitting the amendment, but erred in forcing the defendant to immediately proceed with the trial, without arraignment under and plea to the only information filed which stated an offense, without giving him the statutory time in which to plead thereto, and before a jury which had been impaneled under a void information.

Defendant strongly insists that the court erred in permitting private counsel to conduct the case for the state. When counsel for the defendant moved the court to exclude Mr. Harrington from participating in the prosecution, as hereinbefore set out, the record contains this: "By Mr. Harrington: The parties agree that M. F. Harrington is not the deputy county attorney of Antelope county, has not been appointed by the court to prosecute this case, but has been permitted by the court to prosecute the same, and that he is employed and is paid by the brothers and sisters of the deceased, Albert Brown, and that he has not taken an oath as an officer or deputy county attorney or prosecutor of Antelope county. By the Court: The order of the court having been made at the commencement of the impanelment of the jury herein that M. F. Harrington is permitted to assist the county attorney in the prosecution of this case, and made a matter of record in this case, said order having been made in the presence of the defendant and his counsel; objection overruled by the court, to which ruling the defendant excepts."

It must be remembered that, at the time the court announced Mr. Harrington's permission to assist in the prosecution of the case, there was, as counsel for defendant well knew, no information on file under which defendant could be convicted of any crime. Hence, it was immaterial to him who conducted the prosecution; but, immediately upon the resumption of the trial on the amended information, counsel objected to the participation of Mr. Harrington in the case. If, therefore, the objection was good, we think it was timely. The bill of exceptions shows that all of the most important witnesses for the state were examined, and the principal witnesses for the defense, including the defendant himself, cross-examined by Mr. Harrington. It also appears that, over the objection of defendant, he made the closing argument to the jury. Section 16, ch. 7, Comp. St. 1911, makes it the duty of the county attorney to appear in the several courts of their respective counties and prosecute and defend on behalf of the state and county all actions, civil or criminal. Section 20 provides: "The county attorney may appoint one or more deputies, who shall act without any compensation from the county, to assist him in the discharge of his duties; provided, that the county attorney of any county may, under the direction of the district court, procure such assistance, in the trial of any person charged with the crime of felony, as he may deem necessary for the trial thereof, and such assistant or assistants shall be allowed such compensation as the county board shall determine for his services, to be paid by order on the county treasurer, upon presenting to said board the certificate of the district judge before whom said cause was tried, certifying to services rendered by such assistant or assistants." The stipulation of Mr. Harrington, which we have given above, does not state that the county attorney had, under the direction of the district court, procured his assistance, but, on the contrary, states that he had been employed and was being paid by the brothers and sisters of the deceased; that he had not been ap-

pointed by the court to prosecute the case, "but has been permitted by the court to prosecute the same." When placed upon the witness stand and examined by counsel for defendant, Mr. Harrington testified as follows: "Q. Now, have you ever been appointed under the statutes of this state, the method of which you understand well, to assist the county attorney in the prosecution of this case? A. No; not at public expense. Q. You have simply been permitted to appear? A. I don't know; I have been employed by relatives of the deceased, his brothers and sisters. Q. These relatives live in Bremer county, Iowa? A. I don't know what county. Q. Live near Gritole, in Iowa? A. Some of them, I think. Q. Any of them residents of this section? A. Not that I know of. Q. They employed you and are paying you? A. Yes, sir. Q. And you are appearing here in the capacity of private prosecutor? A. Yes, sir."

The question of the right of private counsel to appear in the prosecution of a criminal action has been before this court a number of times. The first reported case is *Polin v. State*, 14 Neb. 540. That case was decided in 1883. We there held, under the statute as it then existed, that the district attorney in a criminal trial may have the assistance of counsel employed on private account. The next case is *Bradshaw v. State*, 17 Neb. 147, where the rule in *Polin v. State* was reannounced. In that case, however, it appears from the opinion (p. 151), that "the record shows that before any evidence was introduced the district attorney stated to the court that he desired the assistance of Mr. Ashby in the trial of the cause on account of the magnitude of the case; that he had before that time requested his aid," etc. It will be observed that the facts in that case are very different from those in the case at bar. The next case was *Gandy v. State*, 27 Neb. 707, where the rule in *Polin v. State* was again announced. In that case it was insisted by counsel that *Polin v. State* and *Bradshaw v. State*, *supra*, arose under the statute existing prior to the passage of the act of

March 10, 1885 (laws 1885, ch. 40). The opinion then sets out the sections of the statute referred to, which are substantially the same as those now in force. In commenting thereon, COBB, J. (p. 723), said: "But it by no means appears that Martin and Falloon were deputies of the district attorney, appointed under the provisions of the twentieth section, but were his assistants procured by him under the direction of the district court in accordance with the proviso of said section, and were not required to take an official oath other than that as attorneys of the court." It appears from this statement in the opinion that the appearance of Messrs. Martin and Falloon in that case was strictly in accordance with the requirements of statute. The next case is *Blair v. State*, 72 Neb. 501. In that case the syllabus holds: "(10) An objection to the appearance of private counsel to assist the county attorney in conducting a criminal prosecution, to be available, should be made at a suitable time and in the proper manner, and must be supported by at least some showing that the county attorney did not request or require any assistance, and the court had not appointed such counsel for that purpose. (11) *Held*, That a general objection to the appearance of such counsel made during the trial in connection with the examination of a witness, and without any showing to support it, was properly overruled." In the opinion, BARNES, J. (p. 515), said: "No statement was made, or evidence offered, showing, or tending to show, that the prosecution had not requested the assistance of counsel, or that the court had not properly appointed them to render such assistance." Under those facts the decision in that case was clearly right. It is urged by the state that the question of employment of private counsel in the prosecution of a criminal case has been very recently discussed by this court in *Burnett v. State*, 88 Neb. 638. In that case the question was not raised at any time during the trial. Moreover, it could not have been raised under the statute above quoted, for the reason that that

case was a misdemeanor simply, and not a felony. To such a case the statute has no application. The only other authority cited by the state upon this point is the note to *State v. Bartlett*, 24 L. B. A. n. s. 564 (105 Me. 212). There the principal case was simply a misdemeanor. An examination of the copious notes will show that there is a conflict in the holdings of the different states upon this point. In his brief the attorney general says: "I cannot see that the statute of 1893, quoted by counsel, provides for any change of this general rule." In *Biemel v. State*, 71 Wis. 444, and *Bird v. State*, 77 Wis. 276, it is held that a statute very similar to ours does change the rule, and that under it an unofficial member of the bar may not assist in the prosecution for a fee to be paid by private persons. In support of his contention defendant cites *Biemel v. State*, 71 Wis. 444; *Meister v. People*, 31 Mich. 99; *People v. Bussy*, 82 Mich. 49, and other cases. We are impressed with and prefer to follow the rule announced by the supreme court of Wisconsin and the other states that are in harmony therewith. We are not unmindful of the fact that in many cases, particularly in sparsely settled counties, young lawyers of little experience are oftentimes, from necessity, elected to the office of county attorney, and, if the prosecution of felony cases were left to such a county attorney alone, crime might go unpunished. In such cases it is to the interest of the state that such a county attorney should have the assistance of outside counsel; and, if there were nothing in the statute providing therefor, as was the case when *Polin v. State*, *supra*, was decided, we would adhere to the rule there announced; but our legislature, by the statute under consideration, has wisely provided for just such emergencies. In doing so, however, it has not left it to outside parties to select the assistant counsel. It has imposed that duty upon the county attorney and district court, and has provided that the county attorney may, under the direction of the district court, procure such assistance. Counsel thus procured will not be actuated by

sordid motives. He will enter upon the discharge of his duties in the same spirit that any honorable county attorney would enter upon the same, viz., with the desire simply to see that justice is done. It is just as much the duty of a county attorney to see that an innocent man is not convicted as to see that the guilty receive their just deserts. As said by Mr. Chief Justice Christiancy, in *Hurd v. People*, 25 Mich. 405, 416: "The only legitimate object of the prosecution is 'to show the whole transaction, as it was, whether its tendency be to establish guilt or innocence.' The prosecuting officer represents the public interest, which can never be promoted by the conviction of the innocent. His object, like that of the court, should be simply justice; and he has no right to sacrifice this to any pride of professional success." Counsel called to assist in the prosecution should govern his actions in like manner; and, when procured in the manner and for the compensation contemplated by the statute quoted, would doubtless do so; while counsel employed by outside parties, and, in the case of a homicide, by relatives of the deceased, would not feel bound by any such rule of conduct. He appears as private counsel simply, to represent the wishes, prejudice and animosities of his clients; to secure a conviction at all hazards. Such is not the policy of the law as indicated by the legislature, and we must decline to give it our sanction. In the case at bar there is nothing to show that the county attorney, who is a lawyer of known ability, requested the assistance of Mr. Harrington, nor that he had been in any manner previously consulted in reference thereto. The mere fact that the court permitted Mr. Harrington to assist in the prosecution cannot be held to be a compliance with the statute which provides that private counsel may be procured by the county attorney under the direction of the court. This provision of the statute calls for affirmative action by the county attorney and the court. Mere acquiescence in or assent to the appearance of private counsel does not constitute the affirmative action required by the statute and is not sufficient. If in the further

prosecution of this case the court and county attorney deem it necessary to have the assistance of outside counsel, it is their duty to follow the plain provisions of the statute in procuring the same.

As the case will have to be tried again, we will refrain from expressing any opinion as to the weight of the evidence, and will only consider one of the errors complained of in connection therewith. It is urged that the court erred in admitting in evidence exhibits 6, 7, 18, 19 and 22. Exhibits 6 and 7 were two shirts, stained with blood, 18 was the coat, 19 the vest, and 22 the cap of the deceased. The testimony of the coroner, who was also a practicing physician and surgeon, showed conclusively that the deceased had received three blows on the side of his head, each of which fractured his skull, and two of which penetrated the brain, either of which the doctor said was sufficient to have proved fatal. It was thus clearly established that the deceased had been murdered. There was no room for contention that his injuries had been self-inflicted, and the only question before the jury was: Did the defendant commit the murder? The admission of these blood-stained garments and the flaunting of them before the jury could in no manner identify, or even tend to identify, the prisoner at the bar as the murderer. We can conceive of no other purpose which these exhibits could subserve than to excite the passions and inflame the minds of the jury. A defendant who is being tried for any offense, and particularly one involving the possible taking of his life, is entitled to a trial upon competent evidence, evidence which tends to show his guilt or innocence, and not upon evidence which has no tendency in that direction, but which can only serve the purpose of distracting the minds of the jury from the real issue to gruesome exhibits which may easily lead them to a wrong conclusion.

For the errors above indicated, the judgment of the district court is reversed and the case remanded for further proceedings in harmony herewith.

REVERSED.

LEETON, J., dissenting in part.

I am unable to concur in that portion of the opinion holding it was reversible error to permit other counsel to assist the county attorney.

We held in *Rickley v. State*, 65 Neb. 841, that the county attorney has complete control of criminal prosecutions, and that he may exclude other counsel if he so desires, even if the complainant desires to employ such counsel. Of course, this is subject to the direction and control of the court. When the county attorney allows private counsel to appear with him and assist him in the trial without objection, it is clear that he desires his assistance, otherwise he could summarily dismiss him from the case, and when the fact that such counsel is employed and his assistance is desired by the county attorney is known and expressly permitted by the court, as the record shows, the defendant cannot complain.

The statutory provisions (Comp. St. 1911, ch. 7, sec. 16) are intended to limit the liability of the several counties to pay for assistance to the county attorney, and are not intended to deprive him of assistance which he believes to be necessary, and which is furnished with the consent of the court without expense to the county. It is true counsel paid by private persons are apt to err by excess of zeal, but this is entirely within the control of the official prosecutor, and he has the undoubted right to refuse to allow counsel to appear further if they go beyond the limits proper to an official prosecutor.

I think the opinion on this point is opposed to our former decisions and is against the weight of authority. See note to *State v. Bartlett*, 24 L. R. A. n. s. 564 (105 Me. 212).

AMEL H. KOOP ET AL., APPELLANTS, V. LIZZIE ACKEN,
APPELLEE.

FILED OCTOBER 6, 1911. No. 16,529.

1. **Judgment: VACATION: PERJURY.** To require vacation of a judgment because of perjury on the part of the one obtaining it, it must be shown by clear and satisfactory evidence that the alleged false testimony was wilfully and purposely given; that it was material to the issue being tried, and was not merely cumulative, but probably controlled the result.
2. ———: ———: **EVIDENCE.** Evidence found to be insufficient to require the vacation of the judgment complained of.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Affirmed.*

E. C. Strode and Coy Burnett, for appellants.

George W. Berge and Morning & Ledwith, contra.

SEDGWICK, J.

This defendant recovered a judgment against these plaintiffs, as saloonkeepers, and their bondsmen for damages caused by selling intoxicating drinks to her husband. Upon appeal to this court her judgment was affirmed. *Acken v. Tinglehoff*, 83 Neb. 296. These plaintiffs began this action in the district court for Lancaster county to vacate that judgment on the ground that this defendant procured it by perjury. Upon trial that court found in favor of this defendant and dismissed the suit. The plaintiffs have appealed to this court. They contend that this defendant committed perjury in obtaining her judgment with reference to three matters: First, in regard to her having obtained pecuniary aid prior to the time that she alleged that the intoxicating liquors were sold to her husband; second, with reference to the condition of her husband before that time; and, third, with reference to

whether she had ordered one of the plaintiffs to sell liquor to her husband.

1. Upon the first of these assignments in the brief, it appears that in obtaining her judgment she was a witness in her own behalf, and testified that her husband, prior to the wrongs complained of in her petition, was a strong man and able to make a good living, and did make a good living; was never sick, and that she did not get anything from any charity organization, but did get her support from her husband's earnings, and that her husband, while he drank a little, did not drink enough to interfere with his business or work, or with supporting her and her children, but earned from \$100 to \$125 a month for each year during the eight years next prior to the time when she alleged that these plaintiffs were selling him intoxicating liquors. They allege in their brief that this testimony was untrue, and that in so testifying she committed wilful perjury. To support this allegation, they refer to their petition in the case and an affidavit filed therewith, but the case was tried upon issues regularly formed and oral testimony given in open court, and the plaintiffs' petition and affidavit would not be conclusive proof that the testimony referred to was false. No other evidence is referred to in the brief tending to show that the testimony complained of was false, and this part of the case seems to be wholly unsupported.

2. As to the second assignment of the brief, they allege that in obtaining her judgment, in answer to a question whether her husband bought liquors of one of these plaintiffs "right along" after her action was begun, she answered, "No," and also testified that she did not go to one of these plaintiffs and request him to let her husband have liquors, and never told one of these plaintiffs to let him have liquor to drink since the commencement of her suit; whereas, in fact, she signed a written order asking one of these plaintiffs to let her husband have liquor. She testified upon the trial of this case in the court below that she did sign a paper of that character at the request of

her husband; that her husband presented the paper to her, and said: "Sign this paper." And she further testified: "I told him there, I did not want to sign it. When I signed it, I said I did not want to sign this, and he says, 'It will never go farther than me.' That is what he said." If it should be thought that the signing of this paper, under the circumstances and in the condition that this defendant then found herself, would be so material in the trial of her action against the saloon-keepers that her denial of so doing would constitute such fraud and perjury as to require that her judgment should be vacated, it does not appear from the record that she purposely and wilfully denied having signed such paper.

In *Barr v. Post*, 59 Neb. 361, it was held that the giving of false testimony in relation to matters that tended only to affect the amount of the recovery, when there was sufficient evidence of other witnesses to assist the jury in estimating the damage, would not furnish sufficient ground for vacating the judgment. The evidence complained of in this case is all of that character. It is not proved with any certainty that the husband was an habitual drunkard before the plaintiffs furnished him the liquors complained of, and if this defendant, *after her suit for damages was begun*, authorized one of these plaintiffs to furnish her husband with liquor, such action would not furnish a defense; if it was competent in evidence at all, it would only be as tending to show that she consented to the injuries which she complained of, and, in the absence of any other evidence of consent to the sale of which she complained, would be wholly ineffectual for that purpose. In *City Savings Bank v. Carlon*, 87 Neb. 266, it was held that "evidence tending to show that the prevailing party upon the former trial testified falsely upon a vital issue in the case, which false testimony, if believed, might have controlled the decision, is material; and if it appears that the defeated party was without fault or negligence in not producing such evidence, and that the same can be produced on another trial, and might probably change

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the result, a new trial should be granted." The evidence comes far short of bringing this case within that rule. It was said in *Barr v. Post*, *supra*, that "actions of this character are not to be encouraged." The reasons there given for so holding need not be repeated here.

The judgment of the district court is

AFFIRMED.

STATE, EX REL. WILLIAM T. THOMPSON, ATTORNEY GENERAL, RELATOR, V. JOHN J. DONAHUE, CHIEF OF POLICE OF THE CITY OF OMAHA, RESPONDENT.

FILED OCTOBER 21, 1911. No. 16,802.

Quo warranto. Rule as to time within which to file briefs.

Grant G. Martin, Attorney General, and A. F. Mullen, for relator.

W. J. Connell, contra.

PER CURIAM.

Counsel for the state contend that our rules are inapplicable to the instant case, and therefore request a special rule fixing the time within which the litigants shall file their respective briefs. Counsel also request us to set a day for the hearing of this case. This action is prosecuted agreeably to the provisions of sections 1731a, 1731b, Ann. St. 1909. The statute does not give the action preference over other cases upon our docket. Section 5 of the rules of this court (80 Neb. vii) provides that criminal cases will be advanced for hearing without a motion, and that upon motion cases will be advanced which have previously been regularly upon the docket of the court, or, being within the original concurrent jurisdiction of the court, have been prosecuted in the district court and brought to this court by appeal; that

the court may also, in its discretion, advance other cases if they involve questions of public interest. By the terms of subdivision c of rule 9, the rule day, in advanced cases, is the thirtieth day after the order of advancement is entered, unless the court shall otherwise order, by which day the appellant shall serve his brief. The appellee shall serve his brief in 30 days thereafter.

Rule 16 (89 Neb. vii) provides that in all cases the party bringing a cause into this court shall print and furnish a complete abstract or abridgment of the record, with references to the pages of the record abstracted. Rule 17 provides that the rules established for printing abstracts shall apply to all cases wherein the court is called on to exercise original jurisdiction. In such cases the plaintiff must print the abstract and serve it on the defendant or his attorney within 30 days after issue joined, or, if the evidence is taken, within 30 days after the evidence is returned to this court. The evidence in this case was returned to this court July 8, 1911. No abstract was filed until the 9th of October, 1911. No motion has yet been filed to advance the case. Unless an application is made to advance, cases are heard in their regular order. If the case is advanced, the briefs should be filed in accordance with paragraph c of rule 9.

CUMING COUNTY, APPELLANT, V. BANCROFT DRAINAGE
DISTRICT ET AL., APPELLEES.

FILED OCTOBER 21, 1911. No. 16,768.

1. **Drainage Districts: APPORTIONMENT OF BENEFITS.** Under the provisions of the act of 1907 (laws 1907, ch. 153) implied authority is given to apportion to the highways within a drainage district their due proportion of the cost of drainage.
2. ———: ———. The fact that the units of cost are apportioned to a whole road by its record number, instead of to that portion only of the road to be benefited, would not render the apportionment void, so long as it is limited to actual benefits.

APPEAL from the district court for Cuming county:-
GUY T. GRAVES, JUDGE. *Affirmed.*

S. S. Krake and A. R. Oleson, for appellant.

O. C. Anderson and Moodie & Burke, contra.

Courtright & Sidner, amici curiæ.

REESE, C. J.

In the year 1909, the landowners in the northeastern part of Cuming county, together with others in Thurston and Burt counties, organized a drainage district known as the "Bancroft Drainage District," under the provisions of the act of 1907 (laws 1907, ch. 153). The board of directors made their detailed report of the apportionment of benefits, and filed the same with the county clerk. This report appears to have been made in due form, and no objection is made to it in that regard. Due notice of the filing of the report was given. The report contained the apportionment of benefits to certain roads and highways with the number of units apportioned to each road by its record number. The county of Cuming (by its representatives) appeared on the day set for the hearing, and objected to any apportionment of benefits to the public highways, as being an unconstitutional tax thereon. The total apportionment to the public highways was 800 units. The cause was certified to the district court, when it appeared that a number of the supposed roads against which units were charged were not legally established highways, and all such were excluded; the total number of units being reduced to 276. The apportionment was affirmed to that extent. The county appeals to this court.

Two questions upon the merits are here presented and argued: First, that there was no warrant of law for the apportionment of any units of benefit to the public high-

ways within the district; second, that, in case it should be held that there was such power, the benefits were improperly apportioned to the whole road, instead of the tracts of land occupied thereby and benefited by the drainage.

As to the first proposition, it is argued by counsel for the county that there is no provision in the act under which the organization of the district was perfected for the assessment of benefits to public highways; that such assessment could only be made under special statutory authority, and therefore the whole apportionment to the highways was and is void. We have been unable to find any direct authority in the act for the apportionment of benefits to highways as in the act of 1909 (Comp. St. 1909, ch. 89, art. IV), under which the case of *Drainage District No. 1 v. Richardson County*, 86 Neb. 355, was decided; and, if such authority exists in this case, it must be drawn from some other source.

The provisions for the levy of taxes are contained in section 18 of the act of 1907 (laws 1907, ch. 153). It is enacted that the board of directors shall, each year, determine the amount of money to be raised for the payment of bonds and interest, as well as the amount to be raised for other purposes, "and shall apportion the same in dollars and cents to each tract benefited, according to the units of assessment" previously established. The levy is then certified to the county clerk, who extends the same upon the tax lists, to be collected in the same manner as other taxes. It is further enacted that "said drainage district may file claims against any county, city, village, railroad company, or other corporation, private or public, for the share of any annual apportionment to be paid by any such corporation, and, if the same is not paid, the same may be recovered by action in court." It is contended by appellant that no tax can be levied except by statutory authority, and that the foregoing does not confer such authority. We think it is true that legislative authority, express or necessarily implied, is a pre-existing

requirement for levying a tax. There can be no doubt but that a public highway through or over land where drainage is necessary would be benefited by such drainage. It is equally true that the whole traveling public, as well as a county, is interested in the maintenance of such highways in a passable condition. A public road is a unit for practically its whole length, and a limited number of impassable places therein may render it of little, if any, value to the public. The duty of maintaining the public highways in a usable condition is, in effect, imposed upon a county, notwithstanding that duty may be distributed to specific divisions or departments of such county. The public—the county—has an easement over the right of way which the law will protect, and which cannot be destroyed except by a relinquishment of that right by the public authority. So far as the right to the use of the easement is concerned, it is perpetual, except when so relinquished, and is, for all practical purposes, equivalent to a title. Hence, it is provided in section 7 of the act (laws 1907, ch. 153), referring to elections, that “any corporation, public, private or municipal, owning or having an easement in any land or lot may vote at said election, the same as an individual may.” A public highway is an easement which may be benefited by the construction of the ditch. None but the owners of lands or easements within the district and subject to taxation are entitled to vote at the election, but all such owners are. Why? It must be that the legislature intended that all who were given the right to vote were given such right because their property would be subject to taxation, and hence they should have a voice in the question of the formation of the district. No other reason can be assigned. It follows as a necessary conclusion that it was the purpose of the legislature that easements, when benefited, should be subject to taxation, and that public corporations should be no exception to the rule, although a different method of collecting the taxes imposed upon them was provided. By a clear implication it is manifest

that it was the purpose of the legislature that easements held by the public should bear their proper share of the expense of the district in proportion to the benefits received.

As above stated, it is contended that there is error in the apportionment of units of benefit to the different highways within the district. This contention is partially met by what we have said above. The language of the statute (laws 1907, ch. 153, sec. 11), is that the board "shall apportion the benefits thereof to the tracts within said district which will be benefited thereby, on a system of units," etc. It is said in appellant's brief that the assessment "is inequitable and unjust, and does not conform to the standard of assessment made against the lands." From this it is argued that, as there is no provision in the law prescribing the method of assessing highways, the standard fixed for the assessment of the lands (tracts) should be applied, and the assessment upon the road by number is without authority. We are not aware that any specific definition of what shall constitute a "tract" is given in the law. We find none. Government descriptions need not necessarily be followed, although they may be if the benefits accrue to such descriptions as a whole. This being true, there is no hard and fast rule as to what should be included in a tract. If it is thought the better plan to assess each road by its recorded number, we can see no legal objection to doing so, since a number of units placed against each must conform substantially to the actual benefits which the road will receive. It can make no difference to the county whether the apportionment is made to the whole road or only a part thereof, so long as actual benefits only are thus apportioned. Hence, if the apportionment were actually erroneous in the matter complained of, it could not possibly work any prejudice to the county. Absolute and exact equality in such cases can never be attained. An approximation is all that is expected or required. It is sufficient if each tract or parcel of land bears approxi-

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mately its share of the burden. *State v. Several Parcels of Land*, 79 Neb. 638; *Allen v. Drew*, 44 Vt. 174; *Findlay v. Frey*, 51 Ohio St. 390.

Finding no reversible error in the proceedings, the judgment of the district court is

AFFIRMED.

PETER FREDERICK, SR., APPELLEE, V. HANNAH C. MORAN,
APPELLANT.

FILED OCTOBER 21, 1911. No. 16,917.

1. **Accord and Satisfaction: PLEADING.** "To a petition upon a cause of action not controverted, where there is attempted to be pleaded an accord and satisfaction, the plea is bad when the performance necessary to constitute the satisfaction is not alleged." *Goble v. American Nat. Bank*, 46 Neb. 891.
2. Evidence examined, and it is found that an accord and satisfaction is not proved.

APPEAL from the district court for Richardson county:
JOHN B. RAPER, JUDGE. *Affirmed.*

Clarence Gillespie and Edwin Falloon, for appellant.

Reavis & Reavis, contra.

REESE, C. J.

This is an action to foreclose a mortgage on lots 21, 22, 23 and 24, in block 135, in the city of Falls City, Richardson county. The petition may be said to be in the usual form, although unnecessarily elaborate, and seeks the foreclosure of a mortgage given by the defendant to secure two promissory notes of \$666.67 each, one due January 8, 1908, the other due January 8, 1909; they and the mortgage bearing date January 30, 1907. As no question is raised upon the petition, it need not be further

noticed. The defendant filed a pleading, denominated by her as an "answer and cross-petition," in which she admits the execution of the notes and mortgage, alleges that since their execution, but without giving the date, she intermarried with one Albert Sherwood, and under that name she answers the petition. No change was made in the title of the cause, and, as she prosecutes her appeal in the name of Moran, the cause will stand as presented.

In order to an understanding of the matter presented as a defense, we here copy the remainder of the answer in full: "As a defense to said action, this defendant alleges: That she is a physician and surgeon, and has been engaged in the practice of her profession at Falls City, Nebraska, for 17 years; that some time prior to about the 1st day of June, 1909, the plaintiff employed this defendant to treat him for impotence, agreeing at the time that, if she cured him of this malady, he would give her the notes described in said petition, but in any event defendant was to be paid for her time and medicine; that after this defendant had treated the plaintiff for a long time, had furnished him medicine, and had also treated his wife for other ailments, on or about the 1st day of June, 1909, the plaintiff expressed to the defendant the opinion that he was cured, and he then agreed that if this defendant would cancel her bill that she had against him for treating him for this malady, as well as the bill that this defendant had for treating his wife, he would surrender to her the notes described in said mortgage and release said mortgage, to all of which this defendant assented; that plaintiff gave this defendant at that time said notes, and agreed to release said mortgage, but that the plaintiff has failed, neglected and refused to comply with all of the terms of his agreement, in that he has not released said mortgage as agreed. Defendant here pleads the above agreement as an accord and satisfaction of said notes and mortgage. Wherefore, this defendant prays that it may be adjudged that there has been an accord and satisfaction of said notes and mortgage de-

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scribed in petition of plaintiff; that the plaintiff be ordered to release the mortgage of record described in petition, according to his agreement, and, in case he refuses to do so, that a decree of this court be entered to this effect; that defendant be granted such other and further relief as may be just and equitable in the premises, and that she recover her costs herein expended." The reply is a general denial.

When the cause was called for trial, defendant demanded that the trial be had to a jury. The request was overruled, to which exceptions was taken, and the ruling having been presented in the motion for a new trial as one of the grounds therefor is now assigned for error. For the purposes of this decision, we may assume that, had the answer presented a legal defense to the action, a jury trial should have been awarded, but that question is not decided, as it is contended by plaintiff that no defense was presented, and that question requires our attention. It is to be observed that the facts set up in the answer and cross-petition are pleaded as "an accord and satisfaction of said notes and mortgage;" but that fact need not be given special attention, as under the code, if the facts stated entitle a party to relief, it may be granted, if sustained by the evidence, without reference to what name may be given the defense by the pleader. The averments of the answer may be fairly summarized to be that, prior to the transactions set up, she was a practicing physician and surgeon in the city of Falls City, and was employed by plaintiff to treat him; he agreeing that, if she effected a cure, he would give her the notes sued upon, but in any event she was to be paid for her time and medicine; that subsequently plaintiff expressed the opinion that he was cured, and then agreed that, if defendant would cancel the bill she had against him for the treatment of himself and wife, he would surrender to her the notes and release the mortgage, and to which she assented; that he gave her the notes, but refused to cancel the mortgage. There is no averment that

defendant ever canceled her bill which she held against plaintiff, or offered so to do, and hence there was no execution of any such contract on her part, and, until she has complied with her alleged contract, there was no satisfaction of the mortgage debt. The notes, being only the evidence of the debt, even if voluntarily surrendered to her, would not cancel the obligation without a performance by her. This is elementary. *Van Housen v. Broehl*, 58 Neb. 348; *Goble v. American Nat. Bank*, 46 Neb. 891; 1 Cyc. 311 *et seq.* The district court did not err in refusing a jury trial.

It is next contended by defendant that the decree of the district court foreclosing the mortgage is not supported by the evidence. This contention cannot avail. If defendant upon the trial produced her full account against plaintiff, the whole amount thereof was about \$225. The amount due upon the mortgage debt, including taxes paid, was not far from \$1,500. After a careful reading of the evidence, we are wholly unable to see that defendant supported her defense of accord and satisfaction, even by her own testimony. It is not deemed necessary to review the evidence, as defendant made no effort to prove the satisfaction.

The decree of the district court is

AFFIRMED.

FAWCETT, J., not sitting.

SCHOOL DISTRICT, APPELLANT, v. J. K. ELLIOTT, APPELLEE.

FILED OCTOBER 21, 1911. No. 16,965.

School Districts: CHANGE OF BOUNDARIES: APPEAL. A petition was presented to a board consisting of the county clerk, treasurer and superintendent, under the provisions of section 11503, Ann. St. 1909, asking that certain land be detached from one school district and attached to another. The board found the petition "correct," and entered a "request that the change in the district

boundaries be made as asked for in petition," but took no action making the change, the district boundaries remaining as they then existed. *Held*, That, as there was no final order making the change in the boundary lines, there was nothing which could be reviewed on appellate proceedings.

APPEAL from the district court for Cedar County: GUY T. GRAVES, JUDGE. *Dismissed*.

Wilbur F. Bryant and R. J. Millard, for appellant.

P. F. O'Gara, contra.

REESE, C. J.

The second clause of section 11503, Ann. St. 1909, provides, in substance, that upon the petition of any freeholder to a board consisting of the county superintendent, county clerk and county treasurer, asking to have any land described therein set off from the district in which it is situated and attached to another to which it adjoins, that board may act thereon and make the change in the district boundaries. It is provided that the petition shall state the reasons for the change, and no change shall be made unless the territory to be attached has children of school age residing thereon, that they are more than two miles from the schoolhouse in their own district and at least one-half mile nearer to the schoolhouse in the adjoining district, and that the "board may thereupon change the boundaries of the districts so as to set off the land described in said petition and attach it to such adjoining district, as is called for in the petition, whenever they shall deem it just and proper and for the best interest of the petitioner or petitioners so to do."

As shown by the abstract, the following proceedings were had by and before the board designated in the act: "Hartington, Nebraska, March 23d, 1910. To the Board consisting of the County Clerk, Treasurer and Superintendent: Desiring that my renter avail himself of school privileges as set forth in section 4, subd. I, of the school

laws of Nebraska, 1909, I hereby make the following statement: There are living on my farm four children of school age desiring school privileges. This land is south-east quarter of section 11, township 30, range 1 west, in Cedar county, in school district No. 84. I desire this land to be detached from school district 84 and to be annexed to school district No. 98. The distance from the school-house in district No. 84 is two and one-half miles, and from the schoolhouse in district No. 98 is one-fourth of a mile. I certify the statement(s) above are all true and correct, and respectfully request you to make the change indicated. J. K. Elliott, Owner of said land. Signed and sworn to before me this 25th day of March, 1910. (Seal) M. H. Dodge, County Judge. We, the above named board, have examined this petition and find it correct. We request that the change in the district boundaries be made as asked for in petition. W. E. Miller, County Superintendent; G. N. Champion, County Clerk; E. B. Hirschman, County Treasurer. I certify that the above is a correct copy. W. E. Miller, County Superintendent." From this a petition in error was filed in the district court. Upon a hearing in that court, the court found that "no error appears of record," and the petition in error was dismissed at plaintiff's costs. The case is brought to this court by appellate proceedings.

Upon an examination of the record, we are satisfied that no action was taken, either by the board or by the county superintendent, which could, or did, change the status of the land of Elliott. Assuming that the petition was a sufficient compliance with the law to give the board jurisdiction it is very clear that the board took no such action as would lay the foundation for review. The statute says: "The board may thereupon change the boundaries of the districts so as to set off the land described in said petition and attach it to the adjoining district," etc. (Ann. St. 1909, sec. 11503.) Nothing of the kind was done. They found the petition was "correct," and made a "request" that the change in the district be

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made, but took no action making it. The relation of the land to the two districts was not changed, and matters in that regard were not molested in any degree. There was no kind of order made from which any appeal or proceeding in error could be taken. No action is shown to have been taken by the superintendent, and the boundary lines of the districts were left as they had before that time existed.

It follows that there was nothing in the action of the board that could be reviewed by the district court, and no action can be taken by this court, except to dismiss the proceeding, leaving the district boundaries as they previously existed, which is done.

DISMISSED.

H. F. STRAIGHT, APPELLEE, v. JOHN COLEMAN, APPELLANT.

FILED OCTOBER 21, 1911. No. 16,936.

1. Sales: EVIDENCE. Evidence examined, and found sufficient to sustain the judgment of the district court.
2. ———: INSTRUCTIONS. Instructions considered and approved.
3. Trial: DIRECTING VERDICT. Where the plaintiff's evidence in an action at law tends to establish every fact which he is required to prove to entitle him to a verdict, and reasonable men might differ, upon a consideration of all of the evidence, as to whether all of the necessary facts were established, the trial court should refuse to direct a verdict for the defendant.

APPEAL from the district court for Wayne county:
ANSON A. WELCH, JUDGE. *Affirmed.*

Frank A. Berry and Frederick S. Berry, for appellant.

*W. P. Rooney, C. A. Kingsbury and C. H. Hendrickson,
contra.*

BARNES, J.

Action in the district court for Wayne county to recover the purchase price of a mare, sold by the defendant to the plaintiff, on account of false representations. It was alleged in the plaintiff's petition that, in order to induce him to purchase the animal in question, the defendant represented that it was broke to drive and safe to work, and would not kick in harness if certain precautions were used, upon which representations it was alleged that the plaintiff relied. Defendant, by his answer, admitted the sale of the animal for the price alleged in the petition, and denied all of the other allegations contained therein. The cause was tried to a jury, the plaintiff had the verdict and judgment and the defendant has appealed.

It is contended that the verdict is not sustained by the evidence. It appears from the abstract and bill of exceptions that the defendant, in order to induce the plaintiff to purchase the animal, made the representations to him substantially as stated in his petition. This fact was established by the evidence of the plaintiff and his wife, who was present at the time the representations in question were made. Indeed, the defendant does not seriously dispute the plaintiff's evidence, but insists that it was not shown that his statements were relied upon by the purchaser. On this point, it seems clear that but for those statements the plaintiff would not have made the purchase.

It further appears that on the day following the sale the plaintiff and his son attempted to use the animal in question, with another horse, in running a disc harrow; that he used the precautions specified, as he had been instructed to do by the defendant; that in attempting to use her she kicked over the tongue of the machine, and was so vicious and intractable that the plaintiff was unable to use her at all for that purpose; that on the second day thereafter he attempted to drive her to a double

wagon; that he carried out the defendant's instructions to the letter, but the animal kicked so frequently and violently that he was unable to make use of her for that or any other purpose; that thereupon he immediately returned her to the defendant, and demanded repayment of the purchase price, which was refused; that he left the animal in the defendant's barn, and thereupon commenced this action. It therefore seems clear that the plaintiff's evidence, if believed by the jury, was sufficient to sustain the verdict.

Defendant's second contention is that the court erred in refusing to give instruction No. 1, requested by him, which was, in substance, that there was no evidence before the jury showing that the plaintiff relied upon the representations made by the defendant. This instruction was properly refused, because, as above stated, it seems clear from the evidence describing the entire transaction that plaintiff would not have purchased the horse but for the representations above mentioned.

Defendant's third contention is that the court erred in giving paragraph numbered 3 of his own instructions. By that instruction the court informed the jury, in substance, that the burden of proof was upon the plaintiff to establish by a preponderance of the evidence that in making the sale of the horse in question to the plaintiff, and to induce the plaintiff to purchase the same, the defendant made the representations as specified in paragraph one of the instructions (which stated the issues as made by the pleadings); that the plaintiff relied on them, and believed them to be true, and that said representations were false; that plaintiff returned the horse to the defendant; and the jury were further told that if they should find from the preponderance of the evidence that defendant did make such representations to the plaintiff, and the plaintiff relied upon and believed the same to be true, and was thereby induced to purchase said horse, and that said representations were false, and that said horse was not as represented, and that plaintiff returned the

horse to the defendant, then the plaintiff would be entitled to recover, and the fact that the defendant refused to receive the horse and return the money would not defeat the plaintiff's right of action. So far as we are able to ascertain, this instruction was correct, and fairly submitted the matters in controversy to the jury.

Finally, it is contended that the court erred in overruling the defendant's motion to instruct the jury to return a verdict for him at the close of the evidence. From what has heretofore been said, it is apparent that the court properly refused to give this instruction.

After a careful examination of the record, we are of opinion that the defendant had a fair and impartial trial, and, finding no error therein, the judgment of the district court is

AFFIRMED.

GEORGE W. CAMPBELL, APPELLEE, v. MELCHOIR L. LUEBBEN,
APPELLANT.

FILED OCTOBER 21, 1911. No. 17,176.

1. **Statute of Frauds: ORIGINAL CONTRACT.** "If an officer of a corporation orally promises a prospective purchaser of the corporate stock to repay the purchase price at any time and the purchaser acts upon the promise, the agreement is an original contract, and is not within the statute of frauds. The promisor does not thereby agree to answer for the debt, default, or misdoings of another person, nor does he agree to purchase goods, wares, merchandise, or things in action." *Trenholm v. Kloepper*, 88 Neb. 236.
2. **Trial: INSTRUCTIONS.** The court should refuse to give an instruction upon the theory of a party to a suit, where such theory is neither admitted by the litigants nor supported by any competent evidence.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Affirmed.*

Mockett & Peterson, for appellant.

Stewart, Williams & Brown, contra.

BARNES, J.

This case is before us on a second appeal. The law of the case was settled by the judgment on the former appeal. *Campbell v. Luebben*, 88 Neb. 214. In the case of *Trenholm v. Kloepper*, 88 Neb. 236, it was said: "If an officer of a corporation orally promises a prospective purchaser of the corporate stock to repay the purchase price at any time and the purchaser acts upon the promise, the agreement is an original contract, and is not within the statute of frauds. The promisor does not thereby agree to answer for the debt, default or misdoings of another person, nor does he agree to purchase goods, wares, merchandise or things in action." We are of opinion that this rule should be applied to the facts in this case.

It appears on the second trial in the district court the issues were recast, and it was alleged in the plaintiff's amended petition, in substance, that on May 23, 1905, plaintiff purchased, through the defendant, 15 shares of the Luebben Baler Company of the par value of \$1,500, and received therefor stock certificate No. 14 for \$1,000, and stock certificate No. 15 for \$500; that on or about the 15th day of September, 1905, defendant orally promised and agreed with plaintiff that, if plaintiff would purchase other and additional stock of the Luebben Baler Company through defendant, he (the defendant), in consideration of such purchase and payment of money therefor, would repay to plaintiff the amount that plaintiff had paid for all such stock at any time plaintiff became dissatisfied, for any reason, with such investment, and desired the money he had paid therefor returned; that, in pursuance of said promise and agreement, plaintiff purchased through defendant at different times further

and additional shares of stock of the Luebben Baler Company at the price of \$100 a share, to wit: 30 shares September 25, 1905, certificate No. 17, \$3,000, and 9 shares October 19, 1905, certificate No. 18, \$900, and 10 shares December 16, 1905, certificate No. 31, \$1,000, total \$4,900; and it was alleged that the plaintiff took and paid for such stock because of said agreement with the defendant, and relying upon said promise and agreement, and that he would not have purchased said stock but for the agreement. It was alleged that the plaintiff became dissatisfied with the investment and desired the repayment of his money so paid by him to defendant, and, on or about the 1st day of January, 1907, offered to return the shares of stock to defendant, and demanded that he repay plaintiff the sum of \$6,400 so paid by plaintiff as aforesaid; but defendant refused to comply with his said contract, and neglected to pay plaintiff said sum or any part thereof. The petition concluded with a prayer for judgment for the sum of \$6,400, with interest thereon from January 1, 1907, and costs of suit.

Defendant's answer was a denial of each and every allegation contained in the petition, except such as were specifically admitted. It was admitted that plaintiff purchased 15 shares of the Luebben Baler Company stock on the 23d day of May, 1905. It was further stated in the answer that plaintiff purchased of the defendant 30 shares of stock on the 25th day of September, 1905, as evidenced by certificate No. 17 for \$3,000, and that attached to said certificate was a written agreement of the Luebben Baler Company to repurchase said shares of stock when there should have been manufactured and sold 300 of the machines, which the company were to thereafter manufacture and sell. It was also stated that the plaintiff purchased of the Luebben Baler Company 9 shares of stock on the 19th day of October, 1905, as evidenced by certificate No. 18, and that a similar written agreement was attached to said certificate as that above described. It was further stated in the answer that plaintiff pur-

chased of the Luebben Baler Company 10 shares of stock on the 16th day of December, 1905, as evidenced by certificate No. 31, and that a similar written agreement was attached to said certificate; that the total amount of stock so purchased was 54 shares, and the purchase price thereof \$5,400.

Other matters not material to the controversy were alleged in the defendant's answer, all of which were controverted by the reply. So that the issue tried in the district court was, whether or not the defendant agreed to and with the plaintiff, on or about the 15th day of September, 1905, that he would repay to the plaintiff the purchase price of such additional stock in the Luebben Baler Company as he should sell to the plaintiff under the terms of said agreement.

It is disclosed by the abstract and bill of exceptions that plaintiff gave his own testimony, and produced in support thereof the evidence of his wife and daughter; that his evidence and their testimony were sufficient, if believed by the jury, to sustain a finding that the defendant made the agreement to and with the plaintiff set forth in his petition. On the other hand, defendant testified that he never made any such agreement with the plaintiff; that the only agreement that ever existed between them was the one which he alleged was made on the 23d day of May, when plaintiff purchased of him the first 15 shares of the Luebben Baler stock, which was in writing. The trial resulted in a verdict and judgment for the plaintiff, from which the defendant has prosecuted this appeal.

It appears that the defendant requested the trial court to instruct the jury, in substance, that it was admitted by the pleadings and the evidence that the plaintiff, George W. Campbell, purchased from the Luebben Baler Company 54 shares of its capital stock of the par value of \$5,400; that it was further admitted that the defendant, Melchoir L. Luebben, acted as agent for the Luebben Baler Company in the sale of said stock; and that, if

they found from the evidence that the defendant orally promised to repurchase said stock from the plaintiff in the event that the plaintiff should become dissatisfied with the same, such promise would not be enforceable, for the reason that it would be within the statute of frauds. This instruction was refused, and for such refusal defendant assigns error.

We think that the trial court properly refused this instruction, for the reason that it neither conformed to the issues nor was it supported by the evidence. As above stated, plaintiff's testimony tended to establish the allegations of his petition that the defendant agreed that, if the plaintiff would purchase the stock in question of him, he would repay him the amount of the purchase price at any time the plaintiff became dissatisfied with his investment. The defendant, both in his answer and by his evidence, denied that he ever made any such agreement. It thus appears that it would have been error for the district court to give the instruction requested.

Errors are also assigned for the refusal of the court to give other instructions requested by the defendant, but what has been said as to the request above described applies with equal force to all of the other instructions requested.

It is strenuously contended that the court erred in giving instruction No. 8 on his own motion, which reads as follows: "You are instructed that if an officer of a corporation orally promises a prospective purchaser of stock of such corporation to personally repay the purchase price of such stock at such time as the purchaser may become dissatisfied with the same as an investment and wants his money back, and the stock is bought in reliance upon such promise so made, such oral promise would be legally enforceable against the person making the same in his individual capacity. In such a case it would not be necessary, to entitle the purchaser to recover, that he prove any special reason for his being dissatisfied; it would be enough to show that he was in

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fact dissatisfied, and did want and ask such officer for his money back." As we view the record, this instruction was a proper one. It conforms to the issue made by the pleadings and the evidence produced by the plaintiff in support thereof, and follows the rule announced in our former opinion. For those reasons, we feel constrained to hold that this instruction was a proper one.

It is strenuously contended that the trial court erred in refusing, by proper instructions, to submit the defendant's theory of his defense to the jury. On this question, it may be said that the real theory of the defense was that defendant never made the agreement upon which the plaintiff based his cause of action. That theory was properly submitted to the jury by the instructions given by the court on his own motion, and it was not error to refuse to submit defendant's contention to the jury that the agreement was within the statute of frauds, because there was nothing in the pleadings or the evidence tending to establish such a state of facts as would entitle him to have that theory submitted to the jury.

A careful examination of the record discloses no reversible error, and the judgment of the district court is

AFFIRMED.

SEDGWICK, J., concurs in the conclusion.

DAVID C. SNELLER, APPELLEE, v. SAMUEL HALL, APPELLANT.

FILED OCTOBER 21, 1911. No. 16,740.

1. **Landlord and Tenant: LEASE: BREACH OF COVENANT: DAMAGES.**
The measure of damages for a breach of covenant in a lease to put in possession is the difference between the rental value of the premises and the rent reserved in the lease. The lessee may also recover such special damages as he pleads and proves to have necessarily resulted from the breach of the agreement.

2. ———: ———: ———: ———. A leased certain premises to B, who took possession. Afterwards he leased the same premises to C for the same term. C attempted to take possession, but failed. B brought an action for damages against C based upon C's acts in attempting to take possession, the nature of which is not disclosed, and recovered a judgment. A was notified by C of the pendency of this suit and requested to assist. *Held*, That the judgment in and attorney's fees, costs and loss of time of C in defending that action are not proper elements of damage in an action against A on the covenants in the lease to put in possession and for quiet enjoyment.

APPEAL from the district court for York county:
BENJAMIN F. GOOD, JUDGE. *Reversed*.

J. W. Purinton, for appellant.

W. L. Kirkpatrick and George M. Spurlock, contra.

LETTON, J.

This was an action for damages for the breach of two covenants in the lease of a barn, viz., a covenant that the barn should be open to entry by the plaintiff, and one for quiet enjoyment during the term of the lease. The petition pleaded that the defendant had broken both of these covenants, and had leased the barn to one Olmstead, who was then in possession, and that he accepted rent from both the plaintiff and Olmstead for the same term. It pleads that the value of the lease for the unexpired term over rent reserved in the lease was \$50. It further alleges that plaintiff attempted to occupy the barn under his lease, and was sued for trespass by Olmstead on this account; that he notified defendant to defend the suit, which he refused to do; that a judgment for \$5 damages was rendered against him in this action. It is further averred that the plaintiff has been damaged \$100 for judgment, costs and attorney's fees, \$100 for mental worry and humiliation and injury to his feelings, \$76.80 for time and labor and material destroyed and loss of profits, \$20.85 for deterioration in harness, expenses in

attempting to take possession, and rent overpaid. The answer denies the lease of the barn, except from the time that Olmstead would vacate and yield possession, and virtually denies generally all the other allegations in the petition. A trial was had without the intervention of a jury, and judgment rendered in favor of plaintiff for the sum of \$102.90. No bill of exceptions was settled, so that the only question presented is whether the pleadings sustain the judgment.

There is no question but that the petition states a cause of action. Several of the items pleaded are not proper elements of damages in such an action. This would be immaterial if the findings of the district court were general. The court, however, made the following special findings: "For breach of contract, \$1; amount of judgment in trespass suit, \$5; costs of trespass suit, \$17.90; attorney's fees in trespass suit, \$25; loss of time in trespass suit, \$60; barn rent for June, 1908, \$1."

Defendant claims the benefit of the principle that, where the evidence is not in the record, the court will only examine the pleadings to ascertain whether they are sufficient to support a judgment. There are exceptions to this rule. If the findings of the court clearly disclose that, while the petition states a cause of action, yet that recovery has been allowed for certain elements of damage not properly cognizable or allowable in such a case, the court will relieve the appellant from a judgment founded upon such erroneous findings.

We are of the opinion that none of the items of damage relating to the so-called trespass suit are proper elements to be considered in this case. The petition shows that the so-called trespass suit was a civil suit brought by Olmstead against the plaintiff to recover damages for a trespass by plaintiff upon the leased property of which Olmstead was lawfully in possession. It was not a possessory action. It is true that the trespass may have been occasioned by the fact that defendant had leased the same property to both parties, but this we think cannot operate

to enlarge the field of recovery of damages for the breach of the covenants. The plaintiff had his remedy at law in order to gain possession. Damages incurred in a suit to obtain possession of the premises after having vouched in the defendant might perhaps be recoverable, but this was not such an action. So far as the petition shows, plaintiff undertook to take possession, and in doing so inflicted damages upon Olmstead, the nature of which is not disclosed, which Olmstead afterwards recovered in a civil action against him for the tort. The costs and expenses, loss of time, and damages which the plaintiff suffered in defending the civil suit brought against him by Olmstead for trespass grew out of his own mistaken act, and was not a natural or necessary consequence likely to follow from a breach of the covenants. Such a controversy is so far removed from the actual covenants in the lease that the covenantor cannot be said to have reasonably contemplated it as a result of the breach.

The general rule for the measure of damages in such a case as this is the difference between the rent reserved and the value of the premises for the term, and any other damages which have resulted as the direct and necessary or natural consequences of the plaintiff's breach of the contract. *Herpolsheimer v. Christopher*, 76 Neb. 355; *Shutt v. Lockner*, 77 Neb. 397; *Rose v. Wynn*, 42 Ark. 257; *Bernhard v. Curtis*, 75 Conn. 476, 54 Atl. 213; *Adair v. Bogle*, 20 Ia. 238; 3 Sutherland, Damages (3d ed.) sec. 865. We have not been cited to any case extending the scope of damages as far as the plaintiff contends, and we are convinced that no such case can be found. To so hold might render parties liable for damages out of all proportion to the benefits derived from a contract, and expose them to dangers arising from wanton acts by the other party to the contract not reasonably to be foreseen or contemplated as one of the consequences following a breach. For these reasons, all the findings with respect to the trespass suit are erroneous and cannot be upheld.

We think the case is distinguishable from that of

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Blodgett v. Jensen, 2 Neb. (Unof.) 543, cited by plaintiff. In that case the plaintiff was in possession of the land, and the recovery by a prior lessee of the natural products of the soil was treated by the court as of the nature of an ouster. The plaintiff therein was not the aggressor, but incurred the expense in defending his possessory rights after notifying his landlord of the action against him.

The findings as to damages in the particular mentioned and the judgment are not sustained by the pleadings. The judgment of the district court is therefore erroneous, and is

REVERSED.

SEDGWICK, J., took no part in the decision.

TACOMA MILL COMPANY, APPELLEE, v. F. H. GILCREST
LUMBER COMPANY, APPELLANT.

FILED OCTOBER 21, 1911. No. 16,656.

1. **Pleading: CONSTRUCTION.** In an action to recover a money judgment, the pleadings should be liberally construed in the interest of justice.
2. **Sales: BREACH OF CONTRACT: PLEADING.** A petition to recover for the buyer's breach of an executory contract of sale will not be held bad on general demurrer because the pleader did not use the words "damages" or "damaged."
3. ———: **NONACCEPTANCE: DAMAGES.** "Where a buyer wrongfully neglects or refuses to accept and pay for goods under an executory contract for sale, the seller may maintain an action against him for damages, and the measure of damages is the loss directly and naturally resulting in the ordinary course of events from the breach of the contract. Ordinarily it is the difference between the contract price and the market price at the time and place where the goods ought to have been accepted." *Trinidad Asphalt Mfg. Co. v. Buckstaff Bros. Mfg. Co.*, 86 Neb. 623.

APPEAL from the district court for Buffalo county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

Warren Pratt and John N. Dryden, for appellant.

Frank E. Beemer, contra.

ROOT, J.

The point of contention in this case is whether the plaintiff is suing for a balance due on a contract of sale or for damages for its breach. The defendant filed a general demurrer to the petition, and, refusing to plead or answer over when its demurrer was overruled, comes here on appeal to reverse a judgment in the plaintiff's favor.

The defendant relies upon *Backes v. Schlick*, 82 Neb. 289, wherein we held that ordinarily either party to an executory contract has the right by explicit notice to the other to stop performance, subjecting himself to such damages as will compensate the other party for being prevented from executing the contract; that an action by the seller will not subsequently lie to recover the contract price, but his sole remedy is an action for damages for a breach of the contract; and that if the petition, in an action to recover the contract price, discloses such notice before the time for performance, it does not state a cause of action.

The plaintiff contends that it states a cause of action for damages. The pleader states the minutest details of the transaction, and pleads some extrinsic facts and various conclusions not necessary to be stated here. The pleader discloses that the plaintiff's place of business is in the state of Washington and the defendant's place of business is at Kearney, Nebraska, and that the defendant on the 17th of October, 1907, purchased three car-loads of shingles from the plaintiff to be delivered f. o. b. cars at Kearney for the agreed price of \$3.56 a thousand. The correspondence between the litigants with respect to routing the shingles is pleaded, and the delay incident to following the defendant's directions is explained. The plaintiff also alleges that, during the forenoon of Decem-

ber 2, 1907, it loaded for the defendant two cars with shingles, delivered them to a common carrier, and received bills of lading therefor; that, during the afternoon of the day, it received from the defendant a telegram requesting a cancelation of the contract, to which an answer was sent by telegram that the sale would be canceled as to the one car-load not loaded, but that, since the two car-loads had been shipped, the sale could not be canceled as to them. The plaintiff further alleges that one car-load of the shingles arrived in Kearney December 27, 1907, and the other car-load of the shingles arrived at its destination January 1, 1908; that the defendant refused to accept the shingles, and thereupon, after notice to the defendant, the plaintiff sold them to the best advantage in the market on the defendant's account; that the market price of shingles at Kearney at the time of the resale was \$2.50 a thousand, and in Washington \$2 a thousand, but that the shingles were sold in Omaha for \$3.10 a thousand; that the cars contained 571½-thousand shingles; that the difference between the contract price and the price received on a resale, \$321.77, has not been paid, but is due and unpaid, and judgment for that sum, with interest is prayed for in the petition.

The rights of the parties to a contract of sale of personal property and the remedies for its breach are well settled in this state. If the contract is executory and relates to ordinary commodities which have a general market value, the seller's remedy, where the buyer wrongfully refuses to receive or to pay for the goods, is an action for damages for the loss directly and naturally resulting in the natural course of events from the breach of the contract. *Trinidad Asphalt Mfg. Co. v. Buckstaff Bros. Mfg. Co.*, 86 Neb. 623. Ordinarily the recovery is limited to the difference between the contract price and the market price at the time and place where the goods should have been accepted. Had the contract pleaded in the instant case been executed, the goods would have been accepted at Kearney. No particular time is pleaded for the delivery, so that a

reasonable time will be implied. The delay, if any, in shipping the shingles is explained by the pleader, and, as against a general demurrer, will be considered reasonable. The resale on the defendant's account in no manner indicates an action to recover the purchase price. Rather it indicates an intention to ascertain in the most practical manner the plaintiff's actual damages. *Moore v. Potter*, 155 N. Y. 481. The legal effect of that transaction is immaterial in the instant case, because by taking advantage of favorable circumstances the plaintiff resold the shingles for considerably more than the market price at the point of shipment or of their destination. While the pleader does not use the word "damaged" or the word "damages," it does charge every fact essential to show that the plaintiff was damaged by the defendant's wrongful conduct and the amount of that damage, and thereby states a cause of action for damages. *Weaver v. Mississippi & Rum River Boom Co.*, 28 Minn. 542; *Riser v. Walton*, 78 Cal. 490; *Bank of British Columbia v. City of Port Townsend*, 16 Wash. 450.

Section 121 of the code provides: "In the construction of any pleading, for the purpose of determining its effects, its allegations shall be liberally construed, with a view to substantial justice between the parties." Substantial justice in the instant case demands that the defendant recompense the plaintiff for its actual loss naturally and necessarily occasioned by the defendant's default. The fact that but two car-loads were shipped is immaterial. It does not appear that the defendant refused to accept the two car-loads because three car-loads were not shipped.

Applying to the instant case the rule announced in section 121 of the code, we hold that the plaintiff's petition states a cause of action for damages for the defendant's breach of contract, and that the demurrer was properly overruled. It follows that the judgment of the district court should be, and is,

AFFIRMED.

FAWCETT, J., not sitting.

LESLIE D. SPENCE, GUARDIAN, APPELLANT, v. HARDIN U.
MINER, SHERIFF, ET AL., APPELLEES.

FILED OCTOBER 21, 1911. No. 16,770.

Judgment: RELIEF IN EQUITY: JURISDICTION. Where an insane person is by fraud and without consideration induced to sign a promissory note, upon which a suit is instituted in a county court without disclosing the maker's mental condition, and he does not appear and is not represented by his guardian or a guardian *ad litem*, and, after a transcript of that judgment is filed in the office of the clerk of the district court of another county, an execution issued thereon is levied by the sheriff upon the lands of the incompetent, a court of equity in that county has jurisdiction at the suit of the guardian to enjoin the sale of his ward's real estate and to enjoin the judgment creditor from collecting the judgment.

APPEAL from the district court for Johnson county:
JOHN B. RAPER, JUDGE. *Reversed.*

Hugh La Master, for appellant.

L. C. Chapman, contra.

ROOT, J.

This is an action to enjoin the defendant Miner, as sheriff of Johnson county, from selling the interest of William I. Young in a tract of land, and to perpetually enjoin the defendant Boggs from enforcing the judgment upon which the execution was issued. The defendants' general demurrer to the petition was sustained, and the plaintiff's petition dismissed. The plaintiff appeals.

The plaintiff, among other things, in substance, states in his petition: That letters of guardianship were issued by the county court of Johnson county in 1902 to one Duncan as guardian of the person and property of William I. Young, incompetent; that Duncan qualified and subsequently acted as guardian until October 24, 1908,

upon which day like letters were issued to the plaintiff as the successor in office of Duncan, and thereupon the plaintiff accepted the trust and qualified, and is now such guardian. It is also charged that the defendant Boggs in March, 1907, filed a petition in the county court of Lancaster county praying judgment against William I. Young in the sum of \$250 and interest upon a certain pretended promissory note. A summons was issued in that action, and subsequently personally served on the incompetent in Lancaster county. May 15, 1907, a judgment for \$314.92 and costs was rendered by that court against Young on the cause of action set forth in Boggs' petition. January 19, 1909, a transcript of the judgment was filed in the office of the clerk of the district court for Johnson county, and subsequently the execution referred to was issued and delivered to the sheriff. It is also alleged that at the time the suit was commenced in Lancaster county, and at all times thereafter, Young had a good defense to that action, because there was no consideration for the note, the maker was insane to the extent that he did not and could not comprehend the meaning of the instrument, and his signature thereto was procured by the wrongful and fraudulent acts of the payee; that at the time the summons was served Young did not understand its object or purpose, and had no knowledge that the suit was pending; that, although Boggs knew that Duncan was Young's guardian, summons was not issued for him or other notice given of the pendency of that action, and he had no knowledge thereof until more than twelve months after the judgment was rendered.

The legislature has not provided that summons must be served on the guardian of an insane adult in order to give a court jurisdiction to enter a judgment against the incompetent, but section 23, ch. 34, Comp. St. 1909, provides that the guardian of an insane person or incompetent person "shall appear for and represent his ward in all legal suits and proceedings, unless where another person is appointed for that purpose, as guardian or next friend."

It doubtless was considered that suit would not be instituted against an insane person without either making his guardian a party defendant or stating upon the record the ward's condition, so that the court might discharge its full duty by appointing some qualified, disinterested person to protect the incompetent's interests. Otherwise, in such an action the court might, and probably would, be used as an instrument to perpetrate a fraud. The failure to appoint a guardian *ad litem* for an insane defendant personally served with process has been held not to render the judgment void. *McCormick v. Paddock*, 20 Neb. 486. If, however, it is made to appear that the incompetent's guardian was kept in ignorance of the pendency of the suit, that the incompetent's condition does not appear upon the record in the case, and the judgment was rendered upon a fictitious and fraudulent claim, there is error in the record, although it may not appear from an inspection thereof. Section 602 *et seq.* of the code authorize county courts to vacate or modify their judgments after the term at which they were rendered, among other causes, for: "Fifth. For erroneous proceedings against an infant, or person of unsound mind, where the condition of such defendant does not appear in the record, nor the error in the proceedings." Section 609 provides that such proceedings, if commenced under the quoted subdivision, must be commenced within two years after the judgment was rendered, unless the party entitled to relief be an infant or of unsound mind, and, in that event, within two years after the disability is removed.

The plaintiff does not allege that the judgment attacked was rendered by default, but the defendants in their brief concede that the action is brought to set aside a judgment which does not disclose the judgment debtor's condition, so we shall consider this case on the theory that the judgment was not defended by a guardian *ad litem*, and it is admitted that the general guardian had no notice of the pendency of the action.

In the circumstances of this case as they now appear, it was error to render judgment against the incompetent upon this fraudulent claim, but, since the record is fair, the wrong cannot be corrected by appellate proceedings. The guardian had a right at any time during his ward's incompetency to appear in the county court and have the judgment set aside. *Martin v. Long*, 53 Neb. 694. But is he limited to that forum in applying for relief? In *Radzawcit v. Watkins*, 53 Neb. 412, we held that where a judgment was rendered in a county court upon a cause of action predicated upon forged promissory notes, and the sole notice to the judgment debtor was by leaving a copy of the summons at his residence, which process did not come to his notice until after a transcript of the judgment had been filed in district court and an execution issued thereon had been levied upon his property, an action might be maintained by him in the district court to enjoin the collection of the judgment. There was no question concerning the jurisdiction of the county court to render the judgment, but we held that a court of equity should grant relief where the suitor, without fault on his part, and by the fraud of his adversary or through accident or mistake, is called upon to satisfy an unconscionable judgment. We also held that section 602 *et seq.* of the code would not afford the judgment defendant adequate relief, because the county court could not prevent the sale of his real estate while he was litigating his application for a new trial. The same reasons exist in the instant case, and should entitle the plaintiff to relief, unless he is guilty of laches in failing to move for relief in the county court. It is true that equity rewards the vigilant, and not those who slumber upon their rights; but the judgment creditor was taking no steps to enforce the judgment, and the plaintiff might in reason have believed none would be taken. If Boggs had not filed the transcript in the office of the clerk of the district court for Johnson county and had not issued execution thereon, there would have been no necessity for this action, and

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no necessity to incur costs by moving in the county court to set aside the judgment.

In *Wirth v. Weigand*, 85 Neb. 115; we held that the laches of a guardian *ad litem* will not be imputed to the insane person whom he is supposed to represent, and we are of opinion that, under the facts in the instant case, no laches should be imputed to Young, the incompetent, nor to his guardian, the plaintiff herein. In *Wirth v. Weigand*, *supra*, we held that, where the plaintiff in an action against an insane defendant prevails by fraud or perjury, the defendant's guardian may subsequently by an original suit in equity impeach the decree, and secure leave to answer or defend the original action. In that case the judgment attacked was rendered in the same court where the action in equity was instituted, but in the instant case the transcript of the judgment, which is an apparent if not an actual lien upon the ward's real estate, is part of the records of the court where this action was instituted. The sheriff of Johnson county is attempting to execute that judgment, and complete relief cannot be granted in any court other than the forum selected by the plaintiff. We therefore conclude that the petition, while indefinite in some particulars and possibly deficient in others which should appear, states facts sufficient to resist a general demurrer. What we have said with respect to the fraud of Mr. Boggs is predicated solely on the allegations in the petition.

The judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED.

JOHN KANE, APPELLEE, V. CHICAGO, BURLINGTON & QUINCY
RAILROAD COMPANY, APPELLANT.

FILED OCTOBER 21, 1911. No. 16,889.

1. Master and Servant: SICK BENEFITS: DISABILITY. A railway night switchman becoming color-blind during his employment is thereby

disabled by sickness within the meaning of his employer's contract that it will pay him sick benefits for a limited period while he is disabled by sickness or accidental injury, provided the fact be established by proof of acute or constitutional disease.

2. ———: RESIGNATION OF SERVANT: EVIDENCE. A statement in a letter written and sent to the plaintiff by the defendant's superintendent of employment that the plaintiff resigned from the defendant's service is not of itself competent evidence against the plaintiff of such resignation.
3. ———: DISABILITY OF SERVANT: EVIDENCE. Nor is the train-master's statement that had the medical examiner found the plaintiff to have been afflicted with color-blindness, the physician would have reported that fact to the witness, competent evidence to disprove the plaintiff's contention that he is color-blind.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Affirmed.*

James E. Kelby and Arthur R. Wells, for appellant.

Smyth, Smith & Schall, contra.

Root, J.

This is an action to recover sick benefits. The plaintiff prevailed, and the defendant appeals.

At the time the plaintiff entered the defendant's employ as a switchman in 1891, he also became a member of its relief department. In 1907 the plaintiff, as he contends, was discharged or suspended from his employment because of color-blindness. The litigants' stipulation that the plaintiff should recover a definite sum, should it be determined that the defendant is liable, renders unnecessary a consideration of such errors as are assigned upon the rejection of the evidence offered for the purpose of proving that the plaintiff might have worked for the defendant at a reduced compensation. The only instruction presented for our consideration is a request for a directed verdict in the defendant's favor which the court refused to give. The important question, therefore, is whether the evidence sustains the verdict.

There is sufficient evidence to sustain findings to the effect that the plaintiff became color-blind while in the defendant's employ, that he was discharged because of that defect, and that his condition incapacitated him from following his vocation or any other equally as remunerative. The by-laws of the relief department, among other things, provide: "Wherever used in these regulations the word 'disability' shall be held to mean physical inability to work by reason of sickness or accidental injury, and the word 'disabled' shall apply to members thus physically unable to work;" and "to establish a claim for sick benefits there must be positive evidence of acute or constitutional disease sufficient to cause disability." In *Keith, Adm'x, v. Chicago, B. & Q. R. Co.*, 82 Neb. 12, following *Chicago, B. & Q. R. Co. v. Olsen*, 70 Neb. 559, it was held that, as used in these by-laws, the words "physical inability to work" mean "inability to perform manual labor which would enable the injured member to earn wages equal to what he would have earned in the employment in which he was engaged at the time he was injured." As we have said, the evidence establishes that condition. If, therefore, this condition was the result of sickness within the meaning of the by-laws, the plaintiff was entitled to recover. "Sickness" is defined in the Century Dictionary as: "(1) The state of being sick or suffering from disease; a diseased condition of the system; illness; ill health. (2) A disease; a malady; a particular kind of disorder * * * (4) A disordered, distracted or enfeebled state of anything." In the same book we find a definition of color-blindness as "Incapacity for perceiving colors, or certain colors." In commenting upon that condition the author says: "It is not a mere incapacity for distinguishing colors (for this might be due to want of training), but an absence or great weakness of the sensations upon which the power of distinguishing colors must be founded." There is no direct evidence concerning the cause of this defect in the plaintiff's vision, and the defendant's counsel argue that the court cannot take judicial notice that color-blindness

uniformly is caused by sickness, and that without evidence to explain the cause of the plaintiff's condition the jury could not lawfully or logically find that cause to have been sickness. Counsel say that this defect may have resulted from the plaintiff's advancing years, and, if so, the defendant is not liable. It does appear, however, that the plaintiff became color-blind while in the defendant's employ. There is little, if any, evidence to justify a finding that this color-blindness is the result of acute sickness; but could not the jury lawfully have found that it was caused by constitutional disease? The by-laws, as we have seen, recognize constitutional, as well as acute, disease as a satisfactory cause for a disability which will entitle the employee to the benefits of the relief department. We may take judicial notice of the fact that this defect in vision occurs in about 5 per cent. of all human males in civilized countries, and that it is discovered in every period of life from infancy to advanced senility. The jury knew these facts, and were justified in finding that the plaintiff's optical weakness was inbred, but for some reason did not become evident during his earlier years. We do not doubt that the learned trial judge exhaustively and clearly instructed the jury concerning these phases of the case.

Incurable blindness has been judicially determined to be sickness. *Regina v. Inhabitants of Bucknell*, 28 Eng. Law & Eq. 176. The plaintiff for the purposes of his vocation is blind, and, being blind, he is sick, within the meaning of the defendant's regulations. We conclude, therefore, that the verdict is sustained by sufficient evidence.

The defendant attempted to prove by its trainmaster at Wymore, where the plaintiff worked, that, if the department's medical examiner had found from an examination of the plaintiff that he was color-blind, the witness would have received that report. The evidence was excluded, and in this there was no error. Argument and citation are not necessary to emphasize that fact. The court also

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refused to permit this witness to testify that, had the plaintiff offered to work, he would have been given his usual employment. The plaintiff was not requested to return to work, nor was work offered to him by the defendant. It is taxing the credulity of the court to argue that the defendant would have continued the plaintiff as a night switchman, with full knowledge that he was color-blind. No such criminal carelessness will be imputed to the defendant or to its trainmaster.

It is customary for the defendant's superintendent of its employment department to issue a service letter upon request of an employee. In response to the plaintiff's request, such a letter was sent to him. This document contained a statement that the plaintiff had resigned, and was excluded when offered in evidence by the defendant. The evident purpose of this proof was to sustain a contention that the plaintiff had not been discharged or suspended. There is no evidence that the letter was a copy of any record kept by the defendant or that the plaintiff was responsible for the statement of alleged facts. The document was time-serving, and, under the circumstances of this case, was properly excluded. Some incompetent evidence was received, but we do not believe it could, or did, mislead the jury. There is no conflict in the evidence that the plaintiff is color-blind, and the incompetent evidence had no bearing on the disputed issue as to whether the plaintiff voluntarily or involuntarily ceased working for the defendant.

We find no error prejudicial to the defendant, and the judgment of the district court therefore is

AFFIRMED.

BARNES and FAWCETT, JJ., dissent.

NORA PENDERGAST, APPELLEE, v. ROYAL HIGHLANDERS,
APPELLANT.

FILED OCTOBER 21, 1911. No. 16,833.

Insurance: BENEFIT INSURANCE: ENGAGING IN PROHIBITED OCCUPATION: WAIVER. Where a member of a fraternal beneficiary association forfeits his right to participate in the benefit funds of the fraternity by engaging in a prohibited occupation, assurer does not assume the hazards thereof by accepting dues upon the condition that the insurance, if restored, shall extend only to the risks originally assumed.

APPEAL from the district court for Clay county:
LESLIE G. HURD, JUDGE. *Reversed.*

Hainer & Smith, for appellant.

L. B. Stiner and A. C. Epperson, contra.

ROSE, J.

This is a suit on a 1,000-dollar fraternal beneficiary certificate issued by defendant January 9, 1904. Emmet Pendergast was the assured. His mother was the beneficiary and is plaintiff herein. From a judgment in her favor for her claim and interest, amounting in all to \$1,100.50, defendant has appealed.

The answer of defendant contains a plea that assured, who was a farmer when admitted to membership, afterward entered the prohibited occupation of railroad brakeman, was killed as a result of such employment, and that in consequence defendant's liability on assured's certificate was extinguished according to its own terms. In reply to this defense a waiver was pleaded; plaintiff alleging that, after assured became a brakeman, defendant, with full knowledge that he had thus changed his occupation, continued to accept the monthly assessments or dues which, according to the laws of the fraternity, he was required to pay to keep his insurance in force.

The sufficiency of the evidence to establish the waiver pleaded is assailed by defendant, but there is now no controversy over other facts. When assured made his application and received his certificate, he was a farmer. The edicts or laws in force during the entire period of his membership included railroad brakemen in the list of prohibited occupations, and provided that a member by engaging therein terminated his membership and his right to participate in defendant's benefit funds. In the oral argument it was conceded by counsel for plaintiff that the edicts were binding on assured and his beneficiary. Assured, nevertheless, when he was a member, became a railroad brakeman October 9, 1908, was struck by a train December 19, 1908, when so employed, and died a few hours later. To establish the waiver pleaded, plaintiff called as a witness assured's brother, who testified in substance: William Reuter was secretary and treasurer of the local castle of which assured was a member. Late in November, or early in December, 1908, witness paid assured's dues to Reuter, but before doing so told him that assured was in the railroad service, that his policy was not in force, that his dues should not be paid, and that the secretary should not take the dues. The same witness also testified that during the conversation the secretary said he thought assured would quit railroading in a few days, that his dues in that event would be good, and were accepted on that plan. There is nothing in the record to change the import of this evidence. It thus appears that assured's brother, when he paid the dues, understood that the insurance did not include the hazards of the prohibited employment. That it was extended thereto by the acceptance of the dues or by the statements of the secretary is clearly refuted by the testimony mentioned. The conditions under which the payment was accepted limited the insurance to the risks originally assumed, and protected assured to that extent only. Beyond that any waiver proved did not go. In this view of the proofs, the waiver pleaded in plaintiff's reply has not been established.

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There is no other foundation for the judgment, and therefore it is not supported by the evidence. For this reason, it is reversed and the cause remanded for further proceedings.

REVERSED.

LEWIS E. WALKER ET AL., APPELLANTS, v. ANDERS ANDERSON, APPELLEE.

FILED OCTOBER 21, 1911. No. 16,532.

1. **WATERS: IRRIGATION DITCHES: RIGHT TO CONSTRUCT.** In a suit to enjoin proceedings instituted by one landowner to construct a ditch for irrigation purposes across the lands of an adjoining owner, which are already traversed by another ditch, the question is not whether the first ditch is then in a sufficient state of repair or in a condition to answer the purpose for which the second ditch is desired or intended; the question is: Can the first ditch be made to answer such purpose? If so, no right exists to construct the second ditch.
2. ———: ———: ———. Nor, in such a case, can any such right be given by the state board of irrigation, or be acquired in any other manner than that pointed out in section 3, art. I, ch. 93a, Comp. St. 1909, viz., by the written consent and agreement of the owner of the land.
3. ———: ———: **INJUNCTION: BURDEN OF PROOF.** Where A institutes proceedings to condemn the lands of B for the purpose of constructing an irrigation ditch over lands of B, which are already traversed by a prior ditch which has been extended to the line of A's land, injunction is the proper remedy for B; and in such a suit the burden is upon A to show that the first ditch cannot be made to answer the purpose for which the second ditch is desired or intended.

APPEAL from the district court for Dundy county:
ROBERT C. ORR, JUDGE. *Reversed with directions.*

C. E. Eldred, for appellants.

Perry, Lambe & Butler and R. D. Druliner, contra.

FAWCETT, J.

Plaintiffs and defendant are the owners of adjoining lands in Dundy county, lying south of the Republican river. Defendant's lands are located in range 36, and the bulk of plaintiffs' lands in range 37, immediately west. About the year 1891 an irrigation ditch, known as the "Delaware-Hickman ditch," was constructed across plaintiffs' lands. About 1894 defendant constructed a ditch, commencing about 20 rods west of the N. E. corner of section 1, on the lands of plaintiffs, and extending in an easterly direction across the lands of plaintiffs to and over the land of defendant. On May 15, 1908, defendant instituted proceedings before the county judge to condemn a right of way across plaintiffs' lands, about three-quarters of a mile in length and 20 feet in width, and, in addition thereto, a tract of land 50 feet square, at the head and western extremity of said proposed right of way, for the purpose of constructing a head-gate. The point where it is proposed to relocate the head-gate is on the south bank of the Republican river, the purpose being to divert water from that stream. This suit was brought to enjoin the prosecution of such condemnation proceedings. A temporary injunction was issued by the county judge, which, at the hearing in district court, was vacated, and the suit of plaintiffs dismissed. From this judgment, plaintiffs appeal.

Plaintiffs contend that section 3, art. I, ch. 93a, Comp. St. 1909, entitles them to the injunction prayed for. That section reads: "No tract of land shall be crossed by more than one ditch, canal, or lateral, without the written consent and agreement of the owner thereof, if the first ditch, canal, or lateral can be made to answer the purpose for which the second is desired or intended."

There is no controversy over the fact that the construction of the ditch for which condemnation is sought by defendant will cross plaintiffs' lands some distance north of and nearly parallel with the Hickman ditch, so that

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the lands of plaintiffs will be burdened with two ditches. It is admitted by the defendant that he has no intention of changing the existing ditch upon his own land; the only change intended being upon the lands of plaintiffs. The only question, therefore, upon this branch of the case is whether the first, or Hickman, ditch can be made to answer the purpose for which the second is desired or intended. If it can be made to answer such purpose, the plaintiffs are entitled to an injunction as prayed.

There is very little conflict in the evidence, a careful examination of which shows the following facts: All of the land of defendant is under the Hickman ditch, which is extended to defendant's land. There is no claim that the ditch is not of sufficient dimensions to carry water sufficient to irrigate all of defendant's land, nor is it shown that the Hickman ditch could not be made to answer the purpose for which his proposed ditch is desired or intended, as contemplated by the section of statute above quoted. The most that can be said for the testimony offered by defendant is that it shows that for several years there was not a sufficient quantity of water running through the Hickman ditch to irrigate his land. But his own witness, Roberts, shows that as soon as he desired more water than he had been receiving through the ditch he was able to obtain it without any serious difficulty, and after he had done the work upon it, about which he testified, he says it had plenty of water in it. Defendant seeks to escape the force of Mr. Roberts' testimony by showing that the change he had made in the ditch was since the commencement of this suit, but that is immaterial. If Mr. Roberts could make the ditch answer the purpose for which it was constructed, defendant or anyone else could have done so. When a person undertakes to construct a second ditch across another's land, the question is not whether the first ditch is then in a sufficient state of repair or in a condition to answer the purpose for which the second ditch is desired or intended; the question is: Can the first ditch be made to answer

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such purpose. If so, no right exists to construct the second ditch; nor can any such right be given by the state board of irrigation, or acquired by condemnation proceedings. The statute points out the only way by which such right can be obtained, viz., the written consent and agreement of the owner of the land. No such written consent was obtained in this case. The statute is a prohibition against running a second irrigation ditch across another's land, with a proviso; and he who seeks to avoid the prohibition has the burden of proving that he is within the terms of the proviso. This the defendant has failed to do. On the contrary, we are satisfied from the evidence that the Hickman ditch not only can be made, but is probably at this time, sufficient to answer the purpose for which defendant's proposed ditch "is desired or intended." Such being the case, the district court erred in vacating the injunction and dismissing plaintiffs' suit. This conclusion renders it unnecessary to consider the other questions argued in the briefs and at the bar.

The judgment is therefore reversed and the cause remanded, with directions to the district court to enter a decree granting a perpetual injunction as prayed in plaintiffs' petition.

REVERSED.

Root, J., dissents.

DESSIE H. GARFIELD, ADMINISTRATRIX, APPELLEE, V.
HODGES & BALDWIN, APPELLANTS.

FILED OCTOBER 21, 1911. No. 16,540.

1. **Appeal: REVERSAL.** A verdict so clearly wrong as to induce the belief on the part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, will be set aside and a new trial awarded.
2. **Master and Servant: INJURY: EVIDENCE.** Evidence examined and discussed in the opinion held insufficient to sustain the judgment.

APPEAL from the district court for Dodge county:
CONRAD HÖLLENBECK, JUDGE. *Reversed.*

Edgar M. Morsman, Jr., and C. E. Abbott, for appellants.

Courtright & Sidner, contra.

FAWCETT, J.

This action was brought by plaintiff, as administratrix of the estate of Penial J. Garfield, deceased, for damages by reason of the death of her husband, caused, as she alleges, by the negligence of defendants. Plaintiff recovered judgment below, and defendants appeal.

Defendants were engaged in the business of manufacturing and selling tombstones and monuments. In the course of their business, they handled large quantities of heavy stones, many of them weighing several tons each. These stones were purchased in carload lots, hauled by wagon from the cars, and piled in the yard adjacent to their shop. When the stones were brought to the yard, they were handled with a traveling crane. The business was under the charge of defendants themselves. No superintendent or boss of any kind was employed in or about their yards. When defendants were both away, every man in the shop was his own boss. When any of the workmen in the shop desired a stone from the yard, he would himself go to the yard, select the stone desired, and convey the same by use of the traveling crane into the shop. If any assistance was needed or desired, he would call some other employee to assist him. When the stones were placed in the yard, each stone would be elevated above the ground two inches or so by placing under it what are termed "chips of stone"; that is to say, pieces of stone which had been broken or chipped off of the larger slabs. This was done so that the chain could be slipped out at the time the stone was deposited, and in-

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serted again when it was desired to move it, with the aid of the crane, into the shop. When getting in a car-load of stone, if it became necessary to place one stone upon another, a similar space of about two inches and similar blocking was used, so as to permit free use of the chain. The negligence charged against the defendants is: That on or about January 20, 1909, there was a large stone, about 9 feet long, resting upon two triangular stones, which, in turn, rested upon the ground; that these smaller stones were about 35 inches long north and south, each of the three sides being about 9 inches; the upper edge of the east base stone was about 19 inches west of one of the large posts of the crane track, and the other about 6 feet west of such post; that on that date the large stone was, by order of the defendants, cut in two, and the west portion removed; that the remnant of the stone was allowed to remain with one of the base stones above referred to as its sole support, which left the large stone, which is denominated A, nearly evenly balanced upon its supporting stone, extending about 18 inches east and west from the point of said base or fulcrum stone, and touching and being steadied against the west side of said large post, which post was about 19 inches from the center of the fulcrum; that it was left in that condition for five or six weeks, and until the injury complained of; that shortly after said date "the defendants placed on said stone A another stone, herein denominated as B, said upper stone B being about 36 inches long east and west, 18 inches high, and 31 inches wide north and south, and weighing about one ton. Said A and B thereupon were, and continued to be, supported only by said sharp edge fulcrum stone, and in an almost evenly balanced condition, with nothing to prevent them from toppling and falling to the west, and in such condition that they would necessarily topple and fall to the west if only a small amount of weight was placed on the west half of either of said stones. Said condition remained until the happening of the injury herein mentioned. * * *

During all of said time the regular course of conducting the said business of defendants was such as to necessitate and require the frequent and repeated passing and being of the various employees of defendant at a point immediately west of said balanced stones A and B, and said premises so left in said condition were at said point extremely dangerous, and said dangerous condition would have been easily and naturally noticed and observed by defendants and each of them in the exercise of ordinary care with reference to the providing a reasonably safe place for their workmen." That on March 4, 1909, the deceased, who was in the employ of the defendants, in the course of his duties, went to the yard for the purpose of getting a stone weighing several tons, and denominated C, which was at said time to be polished by him, "and which stone at said time was lying immediately south and adjacent to the two stones A and B." That deceased and another employee named Solomon Garfield (brother of deceased) were lifting stone C by means of the traveling crane, and to do so had a chain around stone C and attached to the traveling crane, and a rope running over a pulley, and together were hoisting stone C for the purpose of taking it into the shop; that both of said parties were standing on the north side of stone C, and immediately west of stones A and B; that after stone C had been raised to a certain height, the exact distance being unknown, Solomon Garfield, for the purpose of obtaining a better hold upon the rope and to facilitate the hoisting of stone C, "stepped over and upon said two stones A and B, and said stones A and B, being in a balanced condition, were by his weight tipped downward to the west and the upper stone, sliding off its blocks, fell over and upon said Penial J. Garfield, crushing his leg and inflicting injuries upon him which caused his death. It was customary for employees of the defendants to stand upon or walk upon the stones under said traveling crane, and had been for a long while, and said defendants well knew that it was necessary for and customary for

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said employees to walk and step upon stones lying about and under said crane. Notwithstanding said fact, said defendants permitted said two stones to be and remain in a dangerous condition, the said portion of said large stone having been left in a balanced condition where any weight upon one side of it would cause it to tip, and said stone had been in that condition for about five or six weeks. Said Penial J. Garfield, through no fault of his own, was injured by and through the negligence of the defendant, hereinbefore more specifically set out, which said injury caused his death."

The answer admits the partnership and the business in which defendants were engaged; admits that the deceased, together with Solomon Garfield, was on March 4, 1909, raising a large stone; that Solomon Garfield stepped upon two adjacent stones and caused the upper one of said two stones to slide off, fall upon deceased, and injure his leg. Defendants aver that Solomon Garfield was at that time an employee of defendants and a fellow servant with the deceased; that the stone B was placed upon the stone A either by the deceased or by Solomon Garfield, or some other employee of defendants, a fellow servant of deceased, all without the consent or knowledge of defendants; that the accident happened in broad daylight; that deceased had been employed by defendants for many years, and was more familiar with the condition and situation of the various stones in the yard than defendants; that deceased, by the exercise of ordinary and reasonable care, could have known, and, as a matter of fact, did know, prior to the time of the accident, the exact condition and situation of the stones A and B; that it was the duty of deceased to attend to bringing into defendants' shop stone C; that in the performance of said duty deceased was the sole judge of the method and means of getting said stone into the shop; that it was likewise his duty to take all precautions necessary to ascertain and learn that the place where he was working was perfectly safe, not only for himself, but likewise for his fellow serv-

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ants whom he might request to assist him in moving said stone; that, had deceased used ordinary care and diligence, stone C could have been moved into the shop with perfect safety, not only to deceased, but likewise to the other employees of defendants whom he might request to assist him in moving the stone; that in moving stone C into the shop it was entirely unnecessary for the deceased to stand in close proximity to stones A and B; that the situations and conditions of stones A and B were well known to deceased at the time that he stood immediately to the west thereof; that the injuries suffered by deceased and the accident which happened to him on said date were caused by, owing to, and the result of, his own carelessness and negligence, or of his fellow servants, or of both, which carelessness or negligence on the part of deceased or of his fellow servants, or of both, contributed to or resulted in said accident and the injury to deceased, and without which carelessness and negligence the accident and injury would not have happened. The reply was a general denial.

It will be observed that the issue of negligence on the part of defendants, as tendered by the petition, is clean cut. Succinctly stated, it is that defendants were negligent in permitting the stone A to remain in a nearly balanced condition after the other portion of it had been removed on January 20, and negligent in putting stone B on top of stone A shortly after January 20, and permitting the two stones A and B to remain in that condition for five or six weeks, and until the time of the accident on March 4. No other acts of negligence, either general or specific, are alleged. A careful examination of the record shows that plaintiff failed to prove either of the acts of negligence alleged. Solomon Garfield, the brother of deceased, who was present with him at the time of the accident, when called as a witness for plaintiff, testified: "Q. Did you at any time see any one set that top stone? A. No, sir. Q. Do you know when that top stone was set up there? A. No, sir; I do not." No witness produced by

plaintiff gave any testimony whatever as to when stone B was placed on top of stone A.

For the defendants, it was shown by the witness Whitenack that he was the employee who cut stone A and removed the west two-thirds thereof, and that after he had broken the stone and removed the west portion he thought the portion which he left was perfectly safe. At least one other witness testified that stone A, in the condition in which it was left by Whitenack, was perfectly safe. The testimony of at least two witnesses shows that as late as two days prior to the accident there was no stone resting on top of stone A, and that stone B was still, at that late date, resting on stone C. Not a single witness is produced to prove that defendants or any of their employees placed stone B on top of stone A, or that it was ever seen on top of stone A prior to the time that Solomon Garfield went into the yard to help his brother elevate stone C a few moments before the accident. Mr. Whitenack testified that when an employee would go to the yard to obtain a stone, if he found another stone resting upon it, he would have the upper stone removed. The testimony of other witnesses is that when the deceased went into the yard that morning, if he found stone B resting upon stone C and desired to take the latter stone into the shop, there was plenty of room to have deposited stone B upon the ground without putting it on top of stone A. It was also shown by the testimony of Solomon Garfield that whoever placed stone B on top of stone A placed between the two, as supports for stone B, four car-stakes, three inches thick, with tapered ends. All of the testimony above noted stands in the record uncontradicted. In the light of this clear and undisputed testimony, we do not see how unbiased minds could fail to reach any other conclusion than that, when the deceased went into the yard that morning to select a stone, and selected stone C, he found stone B resting upon it, and that he himself (which he could easily do with the use of the crane) removed stone B from stone C and placed it upon stone A. But

whether so or not, we are still confronted with the fact that the record before us is entirely barren of any evidence showing that defendants placed stone B on top of stone A shortly after January 20, and permitted it to so remain for five or six weeks, and until the time of the accident on March 4, or that defendants or any of their employees (unless deceased himself) ever placed stone B on top of stone A. It is clear, therefore, that plaintiff's allegation that defendants placed these stones together, and permitted them to so remain for five or six weeks, utterly fails for want of proof.

We are unable to agree with counsel that the failure of Whitenack or the defendants to place any additional blocking stones under stone A after Whitenack had removed the west two-thirds thereof, left that stone in a dangerous condition. Conceding that stone A was thereafter in a nearly balanced condition, and giving the benefit of every doubt against the testimony of Mr. Whitenack that when he removed the other portion the portion remaining tipped back against the post, and giving no weight to the testimony of Mr. Baldwin that it would have taken five or six hundred pounds to tip it the way in which it was tipped at the time of the accident, the fact would still remain that the stone in its then condition was not dangerous, for it could not tip more than about two inches, so that, if it had been so nearly balanced that the weight of a man stepping upon the west end would have tilted it, the tilt would have been so slight that it could not have caused any injury to the one who stepped upon it. The fact, therefore, that the defendants, or either of them, may have seen stone A in that condition prior to the injury, and did nothing to change its condition, would not be negligence on their part, for the reason that there was nothing to cause them to suspect that any one would place another stone on top of it, or that, if they did so, they would place between the two, as supports for the second stone, car-stakes with tapered ends. The evidence also shows that the deceased had worked for the defend-

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ants about seven years; that his work was that of polishing; that in the discharge of his duties during all of those years he handled one-third of all of the stones that went into the shop; that when a stone was required he went out into the yard, selected such stone as he deemed suitable, and, with the aid of the crane, took it into the shop; that he would do this without direction of, or supervision by, any one; that he was his own boss and exercised his own judgment in that behalf; that if he desired assistance he would call some one from the shop, just as he did on the morning of the injury. When he went out that morning to get stone C, he went on his own initiative; he was right beside and had a plain view of stone A; and, if stone B was then resting upon stone A, the dangerous condition of the two stones could be plainly seen by him. His brother Solomon, when asked, "How do you know what support there was between the two stones?" answered, "It showed it plainly." "Q. You noticed them before you started to pull? A. Yes, sir; of course, I did not get down and examine them." If their condition showed so plainly that Solomon saw it without getting down and examining them, the deceased was in duty bound to have noted their dangerous condition and to have guarded against it. He not only owed that duty to the defendants and to his fellow servant, his brother, but he owed it to himself. He could not carelessly and negligently shut his eyes to or ignore the dangerous situation which confronted him, and charge the defendants with his own negligent act. Having elected to proceed with his work in the face of the dangerous situation or conditions from which his injury almost immediately resulted, we know of no theory upon which his administratrix can recover. The situation of the plaintiff is unfortunate, but the defendants were, upon the evidence in the record before us, in no manner responsible therefor. The conclusion here reached renders a consideration of the other points urged unnecessary. The rule is well settled in this state that, where a verdict is so clearly wrong as to induce the belief on the

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part of the reviewing court that it must have been found through passion, prejudice, mistake, or some means not apparent in the record, it will be set aside and a new trial granted. The evidence in the case at bar comes strictly within that rule. In our judgment, the verdict is so clearly wrong that it cannot be sustained upon any principle of justice.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

REESE, C. J., dissents.

VILLAGE OF WINSIDE, APPELLEE, v. CURTIS E. BENSHOOF,
APPELLANT.

FILED OCTOBER 21, 1911. No. 16,921.

Appeal: AFFIRMANCE. Upon appeal all presumptions are in favor of the correctness of the judgment of the district court. If the issues and the evidence as contained in the abstract do not show affirmatively that the judgment is wrong, it will ordinarily be affirmed.

APPEAL from the district court for Wayne county:
ANSON A. WELCH, JUDGE. *Affirmed.*

Berry & Berry, for appellant.

H. E. Siman, contra.

SEDGWICK, J.

The plaintiff, the village of Winside, brought this action in the district court for Wayne county to enjoin the defendant from inclosing with fence certain tracts of land which the plaintiff alleged were parts of the public streets in the village. Upon the trial the court entered a decree for plaintiff as prayed and the defendant has appealed.

The appeal was docketed in this court before the 7th day of April, 1911, and an abstract has been filed under

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rule 20 of this court (89 Neb. vii) pursuant to the recent statute. Code, secs. 675f, 675g. This abstract is not as complete as it might be, and the parties in briefing their cause have apparently overlooked that part of rule 16, which is as follows: "The abstract must be sufficient to fully present every error and exception relied upon, and it will be taken to be accurate and sufficient for a full understanding of the questions presented for decision, unless the opposite party shall file a further abstract, making necessary corrections or additions. Such further abstract may be filed if the original abstract is incomplete or inaccurate in any substantial part." No further abstract has been filed. It appears from the abstract that the streets in question are part of Bressler & Patterson's second addition to Winside, and are within and a part of the village. It is the duty of the village to keep its streets open for public use. It devolved upon the defendant to show his right to fence in these streets. He has failed to do so. The defendant claimed to own the whole of certain blocks in that addition, and alleges that he has vacated those blocks. There is no evidence in the abstract as to who platted this addition, nor how this defendant became the owner of these blocks. The defendant fails to bring himself within the provision of the statute. Comp. St. 1909, ch. 14, art. I, sec. 110, which is construed in *Hart v. Village of Ainsworth*, 89 Neb. 418. It appears from the abstract that the defendant claimed that he had leased these tracts of land which are in dispute from the village, and there appears to be some evidence to that effect, and also conflicting evidence. Upon this evidence the court found the issues in favor of the plaintiff, and there is not sufficient shown to enable us to say that the defendant has any right to obstruct these streets.

The issues that were tried are not clearly shown in the abstract, and all presumptions are in favor of the judgment of the district court, which is therefore

AFFIRMED.

CHARLES B. MODESITT ET AL., APPELLEES, v. ST. JOSEPH &
GRAND ISLAND RAILWAY COMPANY, APPELLANT.

FILED OCTOBER 21, 1911. No. 17,004.

1. **Appeal: ABSTRACT.** Under the statute of 1911 relating to abstracts in this court (code, sec. 675f) and rules 16 and 20 (89 Neb. vii), either party may abstract a cause docketed in this court on or before April 7, 1911, and if such abstract "is incomplete or inaccurate in any substantial part" the opposite party may file a further abstract making necessary corrections or additions. The abstract filed "will be taken to be accurate and sufficient for a full understanding of the questions presented for decision," unless a further abstract is filed.
2. **Carriers: INJURY TO LIVE STOCK: EVIDENCE.** Evidence examined and found to support the verdict.

APPEAL from the district court for Hall county:
JAMES R. HANNA, JUDGE. *Affirmed.*

Robert A. Brown and James H. Wooley, for appellant.

Harrison & Prince, contra.

SEDGWICK, J.

1. The appeal in this case was docketed in this court before the 7th day of April, 1911. An abstract was made and filed by appellant under rule 20 (89 Neb. vii). This abstract is criticised by the appellee in the brief, but no further abstract making corrections or additions has been filed, as provided by rule 16, therefore the abstract as filed "will be taken to be accurate and sufficient for a full understanding of the questions presented for decision."

2. It appears from the abstract that plaintiffs alleged in their petition that they delivered to the defendant railroad company at Grand Island, Nebraska, five car-loads of sheep "to be shipped to St. Joseph for said Monday morning market, and were to be stopped at the yards and pastures owned, held, controlled or operated by defend-

ant on its line of road at Stouts, Kansas, 22 miles from St. Joseph, until Sunday evening or night, September 5, 1909. The sheep were taken to Stouts, put in the pastures, with the request and agreement that they be properly cared for until Sunday evening or night, September 5, 1909, and then shipped to St. Joseph and delivered to plaintiffs Monday morning, September 6, 1909; that defendant negligently loaded the sheep about noon Sunday, September 5, deprived them of the rest and feed they would have had, and they arrived at St. Joseph about 6 that evening, where they had to remain in the cars or yards until Monday, September 6; that they were damaged by shrinkage and lessened in value, \$353.85." Afterwards the petition was amended, striking out the words "evening or," leaving the allegation that they were to be cared for by the defendant until Sunday night, and then shipped to St. Joseph.

The answer admits that the sheep were shipped to Stouts, Kansas, and "were to be and were unloaded in pastures September 4, and alleges it understood plaintiffs desired the sheep reloaded for said Monday morning's market; that it reloaded about 5 P. M. Sunday, September 5, and duly forwarded the sheep to St. Joseph on an extra train, the only one available on said evening and night of September 5, 1909; * * * that the plaintiff Dryer, who accompanied the sheep to Stouts, informed the man in charge of the Stouts yards that he would have the stock commissionmen tell him when to send the sheep on to St. Joseph; that on Sunday, September 5, 1909, said stock commissionmen did duly, and in the usual manner, request the defendant to forward the sheep to St. Joseph that day; that, in pursuance of said request, it reloaded about 4 P. M. and forwarded the sheep to St. Joseph, delivered said cars to the St. Joseph Terminal Company about 6:40 P. M., which delivered them to Union Stock Yards Company about 8:10 Sunday, September 5, 1909, as was customary; that it duly and timely performed its entire contract in reference to said shipment; and

denies all negligence on its part." The reply alleged that "there was a regular train during the evening and night of September 5, 1909, later than the said extra, when the sheep should have been conveyed from Stouts to St. Joseph." It also contains a general denial.

The defendant complains of the ruling of the court in allowing the amendment to the petition, and in refusing a continuance made necessary, as it claims, by said amendment, and also complains of a similar ruling of the court upon the trial, and instructions given and refused. There is, however, nothing in the abstract to show that any exception was taken to the ruling of the court upon the amendment of the petition, and, while it appears that an affidavit was filed for a continuance, the abstract does not show the contents of the affidavit. No instructions are contained in the abstract, and none of these questions suggested by the defendant are presented in the abstract. The plaintiffs also assume that there is evidence that is not shown in the abstract, but, as before stated, no further abstract making corrections or additions has been filed by the plaintiffs, and it will not be presumed that the abstract which we have is "incomplete or inaccurate in any substantial part."

The question, then, presented upon this appeal is as to the sufficiency of the evidence to support the verdict. One of plaintiffs, who testifies that he has "handled sheep for 25 years," went with this shipment of sheep to Stouts, and they arrived there soon after daylight on Saturday morning, September 4, 1909. Stouts is about 230 miles from Grand Island and 22 miles from St. Joseph. The sheep were watered and put out in blue grass pastures, and the witness remained there until the afternoon or evening, and paid the defendant for "two days' feed," and then went to St. Joseph. It appears from the evidence that the defendant company maintained pastures at Stouts, a station some 22 miles from St. Joseph, for convenience of its shippers, and the custom is to unload stock at these pastures and allow them to feed and rest

before being shipped on to market in St. Joseph. These sheep arrived at Stouts soon after daylight on Saturday morning, and it was the desire and expectation of the plaintiffs that they be kept on feed in these pastures, and shipped so as to arrive at St. Joseph for the market on the following Monday morning. The sheep were unloaded and put in the pastures on Saturday morning, and on the following Sunday, soon after noon, the defendant began reloading them, and they were shipped from Stouts at, or perhaps a little before, 4 o'clock in the afternoon. It required from one to two hours to run from Stouts to St. Joseph, and the sheep arrived there early Sunday evening. The evidence is that on the next morning they were found to be in bad condition to go upon market, and that the shrinkage was greater than it would have been if they had been loaded and shipped during the night, so as to have arrived at St. Joseph early Monday morning. The regular local train from Stouts to St. Joseph did not run on Sunday. There was a regular through train (No. 26) which regularly left Stouts between 5 and 6 o'clock in the morning, and was due to arrive in St. Joseph at a little before 7. There were two extra trains on the Sunday afternoon in question, one leaving soon after noon and another about 4 o'clock in the afternoon. The sheep were shipped on this later train. The regular train (No. 26) left Stouts on Monday morning at about 5:15, and if the sheep had been loaded during the night and shipped on this train they would have arrived at St. Joseph in time for the Monday morning market, and in better condition, so that the damages complained of would have been avoided.

The question was whether the defendant was negligent in shipping as they did on the extra at 4 o'clock rather than on the regular train (No. 26). The evidence upon this point, as shown by the abstract, is somewhat conflicting. One of the plaintiffs testified that he informed the defendant's agent that the commissionmen at St. Joseph would notify them when to ship the stock, and there is

evidence to show that the commissionmen did notify the defendant during the forenoon of Sunday to ship the stock, and that, in pursuance of this order, the defendant did proceed at once to ship the sheep upon the last train that left during Sunday. It must, however, be remembered that the petition alleges that the sheep were originally shipped to be upon the Monday morning market at St. Joseph. This allegation is not denied in the answer. There is evidence that these pastures at Stouts were maintained by the defendant for the express purpose of putting such animals in condition before they are placed upon the market, and that to load these sheep between 12 o'clock noon and 4 o'clock in the afternoon of a warm day was contrary to the understanding of the parties when they were shipped. There is also evidence that train No. 26 is also a stock train, and on some occasions stops at Stouts to take stock to St. Joseph; that these plaintiffs had before that time shipped sheep from Stouts on that train to St. Joseph. Under these and other circumstances disclosed by the evidence in the abstract, it would seem that the jury might have found that, if the commissionman was to notify the defendant when to take the stock to St. Joseph, such an arrangement had no reference to the hour of shipment, as to whether it should be in the daytime or nighttime, it being understood by both parties that they were to be so shipped as to arrive for the morning market. If, however, it should be thought better to make the shipment for the Tuesday morning or Wednesday morning market, the commissionman might instruct the defendant to hold the shipment accordingly. Whether the fault of making the shipment at this time was upon the defendant company, or upon the plaintiffs themselves or their commission agent, is a difficult question to determine from the evidence shown by the abstract, and it is not so certain that defendant was free from negligence in the matter as to justify the court in setting aside the verdict of the jury and the judgment of the lower court.

This being the only question presented, the judgment of the district court is

AFFIRMED.

KATE O'GRADY, ADMINISTRATRIX, APPELLEE, v. UNION
STOCK YARDS COMPANY, APPELLANT.

FILED OCTOBER 21, 1911. No. 17,099.

1. **Master and Servant: INJURY: QUESTIONS FOR JURY.** There are three principal questions of fact in this case which were by the trial court submitted to the jury. The evidence is examined and found to justify this action of the trial court.
2. **Witnesses: COMPETENCY.** A witness who is accustomed to handling all kinds of domestic animals may be permitted by the trial court to testify to the appearance and actions of a certain animal; it being a question for the jury to determine whether the animal was at the time specified "infuriated and dangerous."
3. **Trial: INSTRUCTIONS.** An instruction given by the trial court is found not to be erroneous, and requested instructions are found to have been properly refused.
4. **Death: DAMAGES.** In an action by a widow as administratrix in behalf of herself and five children to recover damages caused by the death of her husband, who was an active man in good health, 53 years of age, in regular employment at \$60 a month, a verdict for \$5,450 is not so excessive as to require a reversal of the judgment for that reason.

APPEAL from the district court for Douglas county:
HOWARD KENNEDY, JUDGE. *Affirmed.*

Frank T. Ransom and Greene & Breckenridge, for appellant.

Smyth, Smith & Schall, contra.

SEDGWICK, J.

John O'Grady, while in the employ of the defendant company, was killed by an animal in the defendant's

yards, and the plaintiff, his widow, as administratrix of his estate, brought this action in the district court for Douglas county to recover damages on the alleged ground that the negligence of the defendant was the proximate cause of her husband's death. From a verdict in her favor, the defendant has appealed.

The principal question in the case is whether the verdict and judgment are supported by the evidence. It is insisted by the defendant that none of the issues of fact is supported by the evidence, unless it is the fifth and last one stated by the court. There is a main alley running east and west through the yards of the defendant company, and there are "chutes or alleys that run off the main alley north and south." The defendant received animals of all kinds from the railroad companies and others, and handled them in these yards. On the morning of the accident Bodell, who was in the employ of the defendant, and Wilson, who was an employee of a commission firm, were driving a number of hogs towards the west through this main alley. They were stopped by a gate which closed the alley, and saw on the other side of the gate the animal which afterwards killed O'Grady. These large gates are placed at intervals along the main alley. Their purpose seems to be to close the alley so as to turn animals into the side chutes which lead to the different pens. These side chutes also have gates which shut them off from the main alley. After they reached this gate Mrs. Jones, the foreman of the stock yards, came along this alley from the east, and inquired of Bodell why he stopped with the hogs. He was told by one of the men that the reason they stopped was because there was a cow on the other side of the gate. Jones thereupon said, "Open the gate and get her behind the gate," and was told by one of the men: "Do it yourself." Jones then attempted to open the gate so as to allow the men to pass with the hogs and at the same time to confine the cow behind the gate to keep her from passing also. He was unsuccessful in restraining the cow, which rushed through the gate and struck O'Grady, who

was in the alley on the east side of the gate. He was a "yardman." His general duties were in connection with "yarding stock from the chutes." The evidence does not show what, if anything, he was doing at the time, nor how he came to be at the scene of the accident. It appears that the employees of the company usually passed along this alley, and it seems to be conceded that O'Grady was in line of his duty at the time. He seems to have been attempting to pass through the gate, and just as he was opposite the gatepost was struck in the breast by the animal and crushed against the post. He was fatally injured and died a few days afterwards. It is conceded that there is no presumption that a domestic animal of this kind is vicious or dangerous, and that in order to hold the keeper of such an animal liable for negligence it must be shown both that the animal was dangerous and that the keeper knew it. The plaintiff's contention in this regard is that this animal had become infuriated for the time being and was dangerous on that account.

Both parties in their brief have quoted the third instruction given by the trial court as a correct statement of the questions of fact submitted to the jury upon which they were to find their verdict. That instruction is as follows: "You are instructed that under the pleadings and evidence in this case the burden of proof is upon the plaintiff to establish by a preponderance of the evidence each of the following propositions: (1) That the cow which caused the injury to said John O'Grady was at the time of said injury infuriated and dangerous to men on foot; (2) that the defendant's foreman Jones, at the time he opened the gate described in evidence, knew or ought to have known that said cow was at that time infuriated and dangerous to men on foot; (3) that the act of said Jones in opening said gate and striking said cow in attempting to imprison said cow behind said gate was, under all the circumstances as you find from the evidence they existed at that time, a negligent act; that is, such an act as a reasonably prudent person would not ordinarily have

performed under like circumstances; (4) that such negligence was the proximate cause of the injury and death of said O'Grady; and (5) that plaintiff was damaged thereby, and the extent of such damages. Accordingly, if you find that the plaintiff has established by a preponderance of the evidence each and every of the matters set forth in paragraphs 1, 2, 3 and 4, then your verdict should be for the plaintiff in an amount to be determined by you in accordance with instruction numbered 12 hereof, unless you further find that the injury to the decedent was in consequence of an assumed risk of his employment, as hereinafter explained. If, however, you find that the evidence on either of the foregoing propositions numbered 1, 2, 3, and 4 is evenly balanced or preponderates in favor of the defendant, or if you find that the injury to the decedent was in consequence of a risk assumed by him by virtue of his employment, then, in either of such events, your verdict should be for the defendant."

In considering the sufficiency of the evidence, it must of course be borne in mind that these five propositions of facts were properly stated by the court in its instructions, and that they and each of them are peculiarly questions for determination by the jury.

1. We think upon the first and second propositions submitted there can be no doubt that the evidence was sufficient to justify their submission to the jury. The witness Bodell, in company with Jones, the foreman of the yards, and another, passed along the alley a short time before Bodell returned with the hogs. They observed this animal at that time, and were both witnesses upon the trial. Bodell was called by the plaintiff and Jones by the defendant. Bodell had had experience in the yards; he had "handled lots of them." He described the animal as "nervous and fire in her eyes, and ready to make for you at any old time she would get a chance, or anybody." When these three men passed the animal in the alley, Bodell says: "I walked along close to the fence, and the cow stood on the south side of the alley, and I

hugged the fence on the north side. * * * She was then on the south side of the alley, and Jones and myself were on the north side. Ed Mohler was with us as we came east in the alley. * * * When Jones and Mohler and I came past the cow, we did not do anything except get out of her road." Mr. Jones testified: "As I came up, I did not think the cow appeared very bad, and was willing to take a risk of getting within 3 or 4 feet of her. I did not hit the cow hard enough to hurt anything, but I did strike the cow. * * * She started for me as if she had made up her mind she was coming, and I got out of the road. I made up my mind she was coming for me from the way she looked. Her appearance was just like all of them that are in that shape. Any downers, their eyes are not normal." The animal had fallen while being driven with others along the alley, and this appears to explain why she was alone in the alley at the time of the accident, and why the witness speaks of her as a "downer." Wilson, who was with Bodell and Jones when they passed the cow shortly before the accident, testified: "She was what I term a mad cow." While this evidence, and some other similar evidence found in the record, is not conclusive that the animal was infuriated and dangerous to men on foot, who might approach her in the alley, nor that the defendant's yard foreman knew, or that circumstances were such that he should know, that she was a dangerous animal, and is perhaps not very certain nor satisfactory upon either of those points, still it cannot be said that there is such an entire failure of evidence in those particulars as to require the court to determine them as questions of law. The jury having found for the plaintiff, we think it must be considered that the animal was dangerous and that the defendant had notice of that fact.

2. The third proposition submitted to the jury is more difficult. If Mr. Jones, acting for the defendant company, did what a reasonably prudent man having due regard for the safety of others would have done under the circum-

stances, the company is not chargeable with negligence. O'Grady was properly in the alley to the east of the gate. The opening of the gate by Jones gave opportunity for the animal to go through and attack O'Grady. There can be no doubt that this act in opening the gate was the proximate cause of the injury. Was this negligence on the part of Jones? He knew that the employees of the company were accustomed to travel through the alley, but it was not uncommon that an animal in a herd being driven along this alley should be thrown down or otherwise injured and become unmanageable and more or less dangerous. Such accidents were anticipated, a walk was constructed on the fence at the side of the alley, and employees were supposed to be able to keep out of the way of dangerous animals. When Jones began to open the gate, he did not know that O'Grady was near. The evidence is that this was not a "western animal," but what is called a "native," and native cattle are accustomed to men on foot, and as a rule "do not run at a man on foot. Once in a great while they do, but it is not usual. * * * There are 10 chutes between the place where the cow was unloaded and where the accident happened. The chutes are about 34 feet each, so that would be about 340 feet. * * * This cow * * * dropped behind the load at chute '17' and went down in the alley. * * * A man was trying to get her up, was off his horse and trying to get her up, and could not do so; that was at chute '17.' After that we yarded hogs right by her, passed her in the alley, and about 30 or 40 minutes after that the accident to O'Grady happened." The abstract shows this to be a part of Mr. Jones' evidence, and he further testified without contradiction: "This cow had not been out of the car more than a minute until I saw her fall, and I passed by her when she was lying there on the ground. The next time I saw her on her feet was when I opened the gate. This would be 30 or 40 minutes from the time she was unloaded, and I had passed the cow, I should say, two or three times. When she was

lying down she lay as quiet as could be. When I came to open the gate I came from the east, going toward the northwest. My attention had not been directed to this animal before coming to the gate. When I got up there the alley was blockaded, could not go any farther. The hogs were all shut off, one behind the other, and I went up to see what was the matter. I found the cow on the opposite side of the gate. She was then on her feet. I had not seen her between the time she was lying down and the time I got to the gate. * * * Just before the accident I had been down east in the alley and had come up the alley. I passed through this drove of hogs that Bodell was driving. I saw Bodell in the alley, and saw Wilson. Wilson was ahead of the hogs, and when I came up the alley I found for some reason that the hogs could not proceed any farther, and I went to see why. When I got up to this gate it was thrown across the alley, and I found Wilson there at the gate. On the opposite side of the gate was this critter. West of the cow there were other chutes opening into this main alley. Wilson got to the gate before I did, and I borrowed Wilson's whip. I borrowed his whip so as to get this cow behind the 14-foot gate and let the hogs go by. * * * I didn't figure on her being very bad, or I would not have taken the risk I did. I must have been within 3 or 4 feet of her myself. Q. What did you do? A. I borrowed a whip from this man Wilson that testified the other day, a short whip, probably 3 feet long. Q. Do animals of that breed and nativity as a rule submit to human control with a whip? A. Yes. Q. You may state whether or not the use of the whip upon animals in that situation is a common incident of the business there. A. It is the way we handle them all. * * * As I got the gate around, I might say, 5 feet from the post, she whirled at me. Of course, then I climbed up onto the gate, and the gate swung back to the fence. Q. State whether or not you had seen this animal run at anybody before that time. A. No, sir. Q. Do you remember coming down that alley 30 or

40 minutes before the accident, with Bodell and Mohler?

A. No; I have no recollection of that; might have done it.

Q. Do you recall any talk with Mohler wherein you said, in substance, to him, 'Look out for that cow, she will run at you'? A. No; I have no recollection of making that remark."

The plaintiff insists in the brief that it was "highly negligent for him to open the gate without any notice to those in the alley behind him. * * * If he had driven her west, he could have found a chute to the right or the left of him, within a few feet, to put her in, locked her up, opened the main artery of travel—the alley—and endangered nobody." The defendant contends that "if she was then or had been infuriated and dangerous to men on foot, Jones did not know O'Grady was around. Jones was responsible for delays in the work. It was his business to get that animal out of the way, and his attempt to do it was in the ordinary course of business and performed in the usual method."

We cannot say as a matter of law that reasonable men might not, from a consideration of the whole situation as disclosed by the evidence, reach different conclusions as to whether the defendants should have confined this animal, or should have given warning to those who might be endangered by opening the gate, or should have taken other precautionary measures for the safety of its employees. In this condition of the record, the law will not permit us to act upon our own conclusion as to the weight of the evidence. If the question is properly submitted, we must abide by the conclusion of the jury.

3. The defendant complains of the evidence of the witnesses Bodell and Wilson as to the appearance of the animal. It will be remembered that these two men, together with Jones, the yard foreman, passed by the animal shortly before the accident. Jones had an opportunity then and, as is clearly shown, at other times to observe the animal. Bodell was asked: "Describe, Mr. Bodell, her condition, as to her disposition, as to being mild,

fierce, untamed, or otherwise, as you saw it." The question was objected to as incompetent. The court ruled that the witness "might describe her appearance and actions." The witness answered: "Why, she looked nervous looking." The court refused to strike out the answer, and the witness was told to "go ahead," and answered: "Looked nervous looking, and in my way of describing it, I could tell you, because I have handled lots of them. Q. Describe her as you saw her. A. She was nervous and fire in her eyes, and ready to make for you at any old time she would get a chance, or anybody." This witness had been employed in these yards for some time. He was accustomed to handle all kinds of animals. The ruling of the court, of course, was correct that witness should be allowed to describe her appearance and actions. This apparently the witness attempted in good faith to do. We cannot say that the witness would be unable to determine from the appearance of the animal whether it was excited or "nervous" and ready to make an attack upon any one who came in its way. Whether the animal was in a condition to be controlled by ordinary means and whether there was reason to suppose that it would attack any person who came within its reach were matters of difficult investigation. If the witness' description of the appearance of the animal was incomplete and unsatisfactory, he might have been questioned further by either party. We cannot say, under the circumstances, that it was an abuse of discretion on the part of the trial court to refuse to strike out this evidence.

4. The defendant complains of the fourth paragraph of the instruction quoted, but there is no ground for this criticism. The jury could not have supposed that this instruction expressed the opinion of the court as to whether negligence had been established. The instruction criticised in *Olson v. Nebraska Telephone Co.*, 83 Neb. 735, was thought to be capable of such construction, and was therefore condemned. The last part of the fourth instruction given by the court appears to imply that "an

injury arising from a danger which was the result of negligence on the part of the defendant" would "be assumed by the plaintiff" if he knew and appreciated, or should have known and appreciated, the danger occasioned by such negligence. This language was prejudicial to the plaintiff, rather than the defendant, and would not therefore furnish ground for reversal in this case.

5. The defendant complains that the court refused to give instruction No. 2, asked by the defendant. This instruction, among other things, contained the statement that the defendant would not be liable, unless the foreman Jones at the time he opened the gate and allowed the animal to pass through knew "that O'Grady was there." This would be equivalent to an instruction for the defendant, since there was positive evidence that Jones did not at that time know that O'Grady was there, and there was no evidence to the contrary. If Jones knew that the employees frequently passed along this alley, and that there was a probability that some one or more of them were so situated as to be endangered by his act, it would not be necessary that he should also know that O'Grady, the man injured, was at that particular place at the time he opened the gate and permitted the animal to escape.

6. Instructions 3 and 4, requested by the defendant, were also properly refused by the court. It was not necessary that the jury should find that animals "of the breed and nativity of the one in question would not ordinarily submit to control by men on foot" in order to find for the plaintiff, as stated in the third request, nor that Jones knew where O'Grady was at the time, as stated in the fourth.

It is complained that the verdict is excessive. The verdict, as rendered by the jury, was for \$9,164.17. The trial court required the plaintiff to remit \$3,714.17, and, that having been done, entered a judgment upon the verdict for \$5,450. The deceased was 53 years of age; his expectancy was nearly 19 years; he was earning \$60 a

month; he left a wife and five children. If we say that he would probably devote two-thirds of his earnings to the support of his wife and children, they would in 19 years receive \$9,120. The present value would be more than \$5,000 at 6 per cent. We are required by our law to restrict the recovery to the pecuniary value lost to the family. This, however, is not necessarily limited to the dollars and cents which the deceased would probably have expended upon his family if he had lived. Care and maintenance of children mean more than this. The jury may properly consider "his services * * * in the superintendence and attention to, and care of, his family and the education of his children." *Chicago, R. I. & P. R. Co. v. Zernicke*, 59 Neb. 689. The question of damages is for the jury, and the court will interfere with their discretion only when their finding is clearly wrong.

The action of the trial court in determining the limitation of the discretion of the jury in fixing the amount of the recovery is approved, and the judgment is

AFFIRMED.

BARNES, J., dissents.

IDA D. GOINGS, APPELLANT, v. JOSEPH G. GOINGS, APPELLEE.

FILED NOVEMBER 14, 1911. No. 16,539.

1. **DIVORCE: DISMISSAL.** In an action for a divorce, where an answer and cross-petition of recrimination is filed by which a divorce is sought by the defendant, if it be shown by the evidence that neither party is blameless, and the decree of the district court denied a divorce to either, dismissing both the petition and cross-petition, the decree will to that extent be affirmed.
2. —: **DECREE OF SEPARATION.** In an action by the wife for an absolute decree of divorce, in which the defendant presents a cross-petition seeking a similar decree, the question as to whether such decree should be granted to either party, or a decree from bed and board granted to the wife, requires the ex-

ercise of the discretion of the court; and, if the case demands it, a decree of divorce from bed and board, but without dissolving the marriage relation, will be granted to the wife, the evidence showing her to be the less guilty of the two.

3. ———: ———: MAINTENANCE. In such case, when property has been accumulated by the joint labor and frugality of both, but is all held by the husband, a proper provision will be made for the maintenance of the wife.

APPEAL from the district court for Kearney county:
HARRY S. DUNGAN, JUDGE. *Reversed with directions.*

J. L. McPheely and Coleman & Williams, for appellant.

Adams & Adams and L. C. Paulson, contra.

REESE, C. J.

This is an action by the plaintiff, Ida D. Goings, against her husband, Joseph G. Goings, for a divorce. It is alleged in the amended petition as a ground for such a divorce that defendant was guilty of extreme cruelty, by assaulting and striking plaintiff, and by accusing her of the crime of adultery. The custody of their one minor child is also prayed for. Defendant answered, denying the wrongdoing on his part, but alleging that quarrels were of frequent occurrence between himself and plaintiff, and at which times the plaintiff, "who is of an ungovernable temperament, would fly into a passion, would curse, swear and abuse this defendant, and would grab a butcher knife, rolling pin, or any weapon that was convenient, and make for the defendant, and in a vicious manner assault him, at which times the defendant would take hold of her, grab her or restrain her in any way he could; but he denies that he ever struck her with the fist or in any other manner." A number of allegations are contained in the answer, by which it is sought to explain the cause of the "quarrels" referred to, but which should not be set out here. He also presented his cross-petition seeking a divorce from plaintiff on the ground of adultery

committed by her with persons named, extreme cruelty by cursing him in the most profane language, accusing him of impotency, of having contracted venereal diseases at different times, of having committed adultery, and other equally disgusting conditions and acts; that because of the differences between them she had left his home and refused to return, notwithstanding his efforts to induce her so to do. Plaintiff's right to the custody of the child—a daughter, nine years of age—is denied, and it is alleged that plaintiff is not a fit person to rear said child. The averments of the answer and cross-petition are denied by the reply. A trial was had, which resulted in a finding that "plaintiff's and defendant's conduct toward each other has been such that neither is entitled to the relief prayed for." The petition and cross-petition were both dismissed, and the costs were taxed to defendant. Plaintiff appeals.

Elaborate briefs and printed arguments have been filed upon each side of this controversy, and the cause was ably argued at the bar. No important question of law is raised, and but few citations of authority are made. The main, and, indeed, the exclusive, discussion has consisted of a review of the evidence and the presentation of that part which, uncontradicted, would sustain the views of the party making the presentation. The bill of exceptions is voluminous, and abounds in charges and counter charges of the most disgusting character, followed by denials, excuses and explanations, little of which could properly be stated in this opinion. If one-half of the testimony offered by plaintiff is true, and no recrimination offered, she would be entitled to a divorce. If one-half of the testimony offered by defendant is true, and he is not guilty of the acts charged against him, he is entitled to a divorce. We have gone through the whole record and bill of exceptions with care, and are persuaded that a worse condition of domestic discord, and possibly of crime, could hardly be presented on paper. That false swearing—not only by the parties to the suit, but by

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other witnesses—has been indulged in almost without limit would seem to be shown on the face of the record. That acts of lasciviousness, cruelty, and inhumanity have been perpetrated by each of the parties toward the other, if any belief is to be given to their testimony, is without doubt. Each is charged with having violated the marriage covenant in more ways than one—in very many ways. All are denied, and the opposite party is denounced as the sinner. The parties were married in 1884, and at that time neither possessed any means. Both have labored hard during the whole time from the date of their marriage to the time of their separation in 1909, and have practiced economy and frugality in all things, until they amassed a fortune of the value of about \$75,000. But apparently at no time has there been that mutual confidence or forbearance which should characterize the family relation. That defendant has been harsh and inconsiderate of plaintiff's feelings during practically the whole period of their married life is apparent. That plaintiff has been possessed of a quick and almost ungovernable temper is equally apparent. Each has unhesitatingly accused the other of infidelity in the most positive and offensive terms, and each now contends that the other is guilty.

In *Conant v. Conant*, 10 Cal. 249, it is said by the late Judge Field: "The statute says divorces may be granted from bed and board, or from the bonds of matrimony, but it was never intended that either should be indifferently granted according as the prayer of the applicant asked for one or the other modes of relief. It was intended that a certain discretion should be exercised by the courts, according to the special circumstances of each suit, acting upon the settled principles of the common law as applicable to this class of cases. And the true rule which should govern the courts in the exercise of its discretion in this respect is this: That, to entitle to a decree for an absolute divorce from the bonds of matrimony, the applicant must be an innocent party—one who has

faithfully discharged the obligations of the marriage relation, and seeks relief because really aggrieved or injured by the misconduct of the other." Cited and quoted in *McKnight v. McKnight*, 5 Neb. (Unof.) 260. If this rule be applied, it must be apparent that no divorce from the bonds of matrimony can be granted to either party.

Defendant is in the exclusive possession of all the property which has been amassed by their joint labor. Five children have been born to them, four of whom died at birth. The one surviving child—a girl, now about 12 years of age—is with plaintiff. It is admitted that defendant indulged in gross profanity, and no doubt much obscenity, within the household and in the presence of wife and child; and that plaintiff exercised the same high (?) privilege is also charged and to some extent substantiated. Prior to the separation in 1909, and for some time thereafter, the child indulged in the same habits of profanity, but at the time of the trial, through the influence and teachings of plaintiff and others, the habit had well nigh, if not entirely, disappeared. Considering the church and school advantages to which she could and does have access, it is to her advantage to remain with plaintiff for the present at least, but with the right of defendant to visit her at all seasonable times and occasions. Under the evidence, the decision of the district court in refusing an absolute divorce to either of the parties was right. Neither one should be relieved from the restraint of the marriage relation and permitted to contract new alliances. As matters now stand between them, neither seems inclined to yield, nor to exercise that degree of consideration or charity for the other which domestic felicity demands. Defendant being in possession of all their property—enough to supply the comforts and necessities of both—common fairness would seem to indicate that each should have the use and benefit of a portion of the results of their joint labor and frugality.

This cause is in this court for a trial *de novo*. We are

convinced that neither party should receive an absolute divorce, but are of opinion that plaintiff is entitled to a divorce from bed and board, but without dissolving the marriage relation existing between the parties. The custody, control and education of the child, Hazel, should be, and is, given to plaintiff, but with the right of defendant to visit the child on reasonable and suitable occasions. The plaintiff's industry, frugality and good judgment having contributed so much to the accumulation of the property held by defendant, and not having any separate estate, she should receive a liberal allowance from defendant for her support, and he should also pay the expense of supporting and educating their child. An annual allowance of \$1,500 for the support of plaintiff, and the sum of \$300 per annum to be paid to her for the support, maintenance and education of the child, but subject to the future orders of the district court, are ordered to be paid into the district court by defendant in quarterly instalments of \$450 each on the first days of January, April, July and October of each year, the first payment to be made as of the date of the entry of this decree, or within 30 days thereafter. If plaintiff elects, the payment of these charges may be secured by the appointment of a receiver of sufficient of defendant's property to insure a compliance with the decree in her favor. The plaintiff is allowed the sum of \$200 attorneys' fees to be paid into court for the use of her attorneys. All costs to be taxed to defendant.

The decree of the district court is reversed, and the cause is remanded to that court, with directions to enter a decree in conformity with this opinion.

REVERSED.

State v. American Surety Co.

**STATE OF NEBRASKA, APPELLANT, v. AMERICAN SURETY
COMPANY, APPELLEE.**

FILED NOVEMBER 14, 1911. No. 16,559.

Insurance: FOREIGN COMPANIES: FILING STATEMENTS. Insurance companies are not included in the title of article II, ch. 91a, Comp. St. 1911, and are not required to comply with the requirements of that act by filing in the office of the attorney general the statement described therein.

**APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.***

Grant G. Martin, Attorney General, and George W. Ayres, for appellant.

Montgomery & Hall and Hall, Woods & Bishop, contra.

REESE, C. J.

This action was commenced in the district court for Lancaster county by the attorney general, on behalf of the state, to enjoin the defendant from transacting or carrying on the business of a surety company within the state, the averment of the petition being that it had failed and refused to file in the office of the attorney general the statement required by section 4, art. II, ch. 91a, Comp. St. 1911. It is alleged in the petition, in substance, that the defendant is a corporation, incorporated under the laws of the state of New York, and is engaged in the transaction of the business of a surety company in this state, having established agents throughout the state; that it is not a Nebraska corporation nor a corporation whose stockholders are personally liable for its debts, and is not engaged in any of the lines of business named in the exception contained in section 4 of the anti-trust laws of this state; that, as the defendant corporation is engaged in business in this state, it is its duty to file the statement in the office of the attorney general as required

by said act, but that it has refused so to do, and that, by reason of its failure to comply with the law, it is unlawfully engaged in business in this state. The prayer is that it be enjoined from further carrying on its business within the state. The defendant demurred upon the ground that said petition did not state facts sufficient to constitute a cause of action. The demurrer was sustained by the district court, and the cause dismissed. Plaintiff stood upon its petition and appeals, assigning as error the ruling in sustaining the demurrer.

A wide range is taken in the briefs, and many questions are therein presented and were also discussed in the oral arguments. The principal and underlying question involved is as to the construction to be given to what is known as the "Anti-Trust Law" of this state. An act, commonly known as the "Junkin Act," was passed by the legislature in 1905 (laws 1905, ch. 162), the title to which is, "An act to protect trade and commerce against unlawful restraints and monopolies, and to prohibit the giving or receiving of rebates on the transportation of property, and to provide a penalty for the violation thereof." Section 4 of the act is as follows: "That from and after the 30th day of June, in the year 1906, no corporation, joint stock company, or other association, whose stockholders are not personally liable for their debts, except corporations incorporated under the laws of the state of Nebraska, and common carriers and corporations owning or using property exclusively in connection with the business of transportation, and corporations engaged in furnishing additional accommodations to passengers as such while being carried by such carriers, shall engage in business within this state, or continue to carry on such business, unless it shall comply with the following conditions." The conditions imposed are too long to be here copied, and it is only necessary to say that the corporations included within the provisions of the act are required to file a statement in the office of the attorney general making quite a complete showing of the organi-

zation and financial status of the corporation or association. This statement the defendant did not file, and claims that it, being an insurance company, is not required so to do by the act. As will be observed, the title to the act is to protect "trade and commerce" against unlawful restraints and monopolies. It is insisted by defendant that the insurance business cannot be held to be included within those two words; that, if it cannot be so included, the provisions of section 4 are not to be applied to it. This last proposition is conceded by the attorney general's department, but it is strenuously insisted that that business is included, and that foreign insurance companies are required to file the statement, and hence that duty is devolved upon defendant. The demurrer admits all well-pleaded, issuable material facts alleged, and hence it is taken as true that the defendant is a foreign corporation doing business in this state, that its stockholders are not personally liable for its debts, and that it is not within the exception contained in section 4 of the act. The sole question to be here decided is: Is defendant engaged in "trade" or "commerce" within the meaning of the title to the act. The terms "trade" and "commerce" have received a great number of definitions by the courts, but cannot all be applied to this case. We should keep in view the sense and connection in which they occur in the act under consideration.

One of the cases cited by the attorney general is *In re Pinkney*, 47 Kan. 89, 27 Pac. 179. The title to the act under consideration in that case was, "An act to declare unlawful trusts and combinations in restraint of trade and products, and to provide penalties therefor." In a section of the act it was provided that all contracts or arrangements to control the cost or rate of insurance was prohibited. The supreme court of Kansas held, correctly we think, that the title to the act was sufficiently comprehensive to include "trusts and combinations" in restraint of insurance; that, in the sense in which the

word "trade" was used in the title, it would include business, occupation, employment, etc.; and that a "combination" in restraint of the business of insurance could be prohibited under the title to the act. When we compare the titles to the two acts and the purposes of the legislature in the two instances, we are unable to derive much benefit from a consideration of the Kansas case. The decision was rendered by two of the three judges, and they say: "We reach the conclusion, not without some doubt, however, that the provision of the act with reference to insurance is not foreign to the title of the act," nor violative of the constitution. One member of the court dissented. In the majority opinion it is said: "The meaning given by the legislature to the terms used for expressing the subject of the act should be considered by the court in determining the sufficiency of the title. While the legislature cannot extend the scope of the title by giving to a word therein a definition which is unnatural and unwarranted by usage, still if the word admits of the construction given to it by the legislature, and can be properly used in a sense broad enough to include the provisions of the act, the intention of the legislature is entitled to great weight in determining the sufficiency of the title"—citing *Woodruff v. Baldwin*, 23 Kan. 491. It is to be observed, as we have shown, that the title to the act then under consideration was to declare unlawful trusts and combinations in restraint of trade and products. In the majority opinion it is held that the language of the title is of doubtful meaning, whether in an extended or limited sense, and that the provision of the first section of the act, which declares that "all arrangements, contracts, agreements, trusts or combinations between persons or corporations * * * which tend to advance, reduce or control the price or the cost to the producer or to the consumer of any such products or articles, or to control the cost or rate of insurance * * * are hereby declared to be against public policy, unlawful, and void," shows an interpretation or

meaning given to the word "trade" in its extended sense, and that the act was thereby brought within the protection of the constitution. In the act now under consideration we have no such aid, but are limited to the words "trade and commerce" in the sense in which they are used in the title, unaided by legislative interpretation, as in the Kansas case.

In *Queen Ins. Co. v. State*, 86 Tex. 250, 24 S. W. 397, the title to the act under which the suit was brought was, "An act to define trusts, and to provide for penalties and punishment of corporations, persons, firms, and associations of persons connected with them, and to promote free competition in the state of Texas." The suit was against some 57 insurance companies, and it was alleged that they had combined together to fix the rate of commissions of local insurance agents, and to fix and establish uniform rates of insurance throughout the state, and which they were enforcing to the detriment of the public, and the relief sought was an injunction restraining the accused companies from doing business within the state. Under this title the act defined trusts to be a combination of capital, skill, or acts by two or more persons to create or carry out restrictions in trade; to fix any standard or figure whereby the price of any article or commodity of merchandise, produce or commerce intended for sale, use or consumption, to the public should be controlled or established; or to enter into any contract by which they shall bind themselves not to sell or dispose of any article or commodity, or article of trade, merchandise, use, commerce or consumption below a common standard figure, or settle the price thereof between themselves and others. The supreme court of that state held that insurance did not come within the terms of the act, holding, in effect, that it was neither "trade," "commerce" nor "commodity," and the injunction was denied.

The case of *Beechley v. Mulville*, 102 Ia. 602, is cited by the attorney general. In that case the statute under consideration provided that if any corporation organized

for transacting or conducting any kind of business in the state, or any partnership or individual shall create, enter into, become a member of or party to any pool, trust, agreement, combination or confederation with any other corporation, partnership or individual to regulate or fix the price of oil, lumber, coal, grain, flour, provisions, or any other commodity or article whatever, such persons should be guilty of a conspiracy, etc. A number of persons entered into a conspiracy to fix insurance rates, imposing penalties and a loss of business upon any agent who should deviate from the standard of prices and rates fixed. The action was for damages by one of the conspirators against the others, upon the ground that he had refused to continue to be governed by the "compact," and for such refusal his business had been destroyed by his co-conspirators. It was contended by the defense that the business of insurance was not within the provisions of the act, and that their compact or agreement was lawful. But the court held otherwise, basing its decision on the sweeping language of the act. It was also held that the plaintiff could not recover, as the action of the defendants was but carrying out the written compact between themselves and plaintiff.

The case of *Betz v. Maier*, 12 Tex. Civ. App. 219, cited by plaintiff, affords little, if any, light upon the question before us. The appellee in that case had levied an attachment upon an iron safe belonging to the appellant, who was an insurance agent; the safe being used by him in his business as a receptacle for the safe keeping of his policies and other papers in use in his business. He claimed the safe was exempt under the statute which exempted all tools, apparatus and books belonging to any trade or profession. It was held that under the rule requiring a liberal construction of exemption laws the safe was exempt, the business of an insurance agent being a trade or profession.

As applicable to the statute now under consideration, we can gather but little light from the decided cases.

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This is not a case involving the question of the legality or illegality of any trust agreement or combination. It may be that had the legislature in specific terms, as in the Kansas case (*In re Pinkney, supra*), included the subject of insurance in the section requiring the filing of the statement, that fact might have furnished a legislative construction or interpretation of the words "trade and commerce" as used in the title and thus brought the provision within it. But such is not the case. The whole trend of the title seems to be to "protect trade and commerce from unlawful restraints and monopolies" in the traffic and transportation of property. Such seems to be the purpose of the whole act, with nothing to show a different intent. It is true that the words might have been used in a different sense, but the context seems to limit their meaning. This being true, it must be apparent that the requirement of the annual statement, as provided for in the fourth section of the act, applies only to the quality of "trade and commerce" referred to in the title, and that insurance companies are not included.

The judgment of the district court is

AFFIRMED.

ROSE, J., took no part in this decision.

HERMAN HAAS ET AL., APPELLANTS, V. GUSTAVE WELLNER,
ET AL., APPELLEES.

FILED NOVEMBER 14, 1911. No. 17,049.

Deeds: DELIVERY. The delivery of a deed by the grantor to a third person to be delivered to the grantee will be equivalent to a delivery to the grantee, if the existing equities required such delivery and it is apparent that the grantor so intended it.

APPEAL from the district court for Cheyenne county:
HANSON M. GRIMES, JUDGE. *Affirmed.*

Wilcox & Halligan and O. A. Torgerson, for appellants.

W. P. Miles and J. L. McIntosh, contra.

REESE, C. J.

This is an action to partition section 11, in township 16 north, of range 51 west, in Cheyenne county. The suit is prosecuted by heirs at law of Joseph Haas, late of the city of Nauvoo, in the state of Illinois, who died testate September 20, 1898. His will was executed on the 1st day of August, 1876, by which he devised and bequeathed to his wife, Catherine Haas, all his real estate and personal property during her natural life, without further specification or identification. The will was admitted to probate in Hancock county, in that state, on the 17th day of October, 1898. Joseph and Catherine had each been married prior to their intermarriage, and each had children living. Other children were born to them after their marriage. The children of Joseph Haas, born before and after his marriage to Catherine, are the plaintiffs in this case. Gustave Wellner, one of the defendants, is the son of Catherine, born before her marriage to Joseph, and the defendant "Mrs. Gustave Wellner," known in the record as "Belle Wellner," is his wife. There are other parties to the suit, but they need not be here referred to. In the year 1885, and a long time prior to the death of Joseph Haas, the defendant Gustave Wellner purchased the east half of section 3, township 16, range 51, and the north half of section 11, in the same township and range, from the Union Pacific Railroad Company, under the usual ten-year instalment contract. Belle Wellner, his wife, with her own means and under a like contract, purchased the south half of said section 11. They met the payments as they matured for some time, but unfavorable climatic and financial conditions rendered it impossible for them to keep up the payments, and they assigned their contracts to Joseph Haas, who completed the payments and received a deed of conveyance from the rail-

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road company. After the completion of the payments, but before receiving a deed, Joseph Haas and wife, Catherine, executed to defendant Gustave Wellner a bond for a deed to the north half, and to Belle Wellner a similar bond for the south half, of said section 11. The bonds each provided for the payment of \$633 by the obligees on or before the 1st day of May, 1895. They were executed on the 5th day of March, 1889. The east half of section 3 is not referred to in the bonds. It appears that in the early spring of 1893 defendant Gustave Wellner wrote Joseph to meet him in Lincoln at a time named, when he would pay the amount due Haas and receive the deed of conveyance. On the 21st day of March of that year, and before leaving for Lincoln, Joseph Haas and wife, Catherine, made and acknowledged a deed to Gustave of all of said section 11, and Haas brought it with him to Lincoln for delivery upon the receipt of the payments due. Gustave failed to meet him in Lincoln, and he returned home in an angry mood, and declared that, if Gustave should desire to redeem the land by paying the amount due, he could come to Nauvoo to do so. The deed was laid aside, but never destroyed. Later he gave the deed to his wife, the mother of Gustave, and directed her to give it to Gustave, or to Belle, if she should come to Nauvoo. Belle did not go to Nauvoo, and the deed appears to have been forgotten by Catherine, who was then in advanced old age. The proof of the giving of the deed to Catherine and the instruction to her to give it to the grantee, or his wife, depends upon the testimony of Catherine, whose deposition was taken when she was 83 years of age, somewhat advanced in senility, and possessing but indifferent knowledge of the English language. Her memory and other faculties appear to have been impaired to a considerable extent. After the death of Joseph and the appointment of Catherine as executrix, she inventoried this land as a part of the assets of the estate of Joseph, and at that time the deed was seen among the papers of the estate. Later, she having only

a life estate in the land, as she supposed, and it being unproductive, she made a quitclaim deed thereof to the heirs of Joseph Haas. During the lifetime of Joseph Haas, defendants Gustave and Belle Wellner assigned their bonds to S. C. Ingraham, and by their deed conveyed to him all of section 11, and he subsequently made a similar transfer to A. L. Green. These instruments having been placed of record, Joseph Haas instituted a suit in the district court for Cheyenne county to remove the cloud thereby cast upon his title. That suit appears to have been adjusted, and his title was quieted by conveyances. It appears that that suit was to some extent under the direction of defendant Gustave, and the costs were paid by him. Louis Haas, one of the sons of Joseph Haas, died, and Gustave purchased the interest which he was supposed to own in the land (being one-eighth) of his heirs, and his title to that interest is conceded by plaintiffs. The title to the east half of section 3 is not involved in this suit. In the year 1906 defendant Gustave Wellner was in Nauvoo, when he and his brother were looking through a lot of discarded papers which had been left in a garret of the former home of Joseph and Catherine Haas, when the deed to Gustave of section 11, executed in 1893 by Joseph and Catherine, was found. This was the first knowledge he had of its existence. He and his brother took the deed to their mother, Catherine, and inquired of her what it meant, etc. She took it and examined it carefully. Then, holding up her hands, declared that she had forgotten all about it; that it had been given to her by Joseph in his lifetime for Gustave, with instructions to give it to him, which she then did, and Gustave caused it to be recorded in Cheyenne county. This suit is brought by the heirs upon the theory that the deed of 1893 was never delivered to Gustave by Joseph Haas, nor by any one for him, and that it conveyed no title; that by the conveyance of Gustave and Belle to Ingraham they had divested themselves of all interest in the property.

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Some correspondence between Joseph Haas and Gustave is shown in the abstract. The letters from Joseph were in the German language; those from Gustave in broken English. At one time, the date not given, but some years before the trial, defendant received a letter from Joseph Haas written in the German language, the translation of which was procured by a Mr. Solomon. The letter had been lost, and could not be introduced in evidence upon the trial, but Mr. Solomon testified that he had read it so often he knew it "nearly by heart;" that in that letter "Mr. Haas made a proposition to Gustave Wellner. He said he owed him \$1,100, and, if he turned over section 3 to him, he should have section 11 and get a receipt for the \$1,100 besides." The letter is described as being in the handwriting of Joseph Haas and written with red ink. A Mr. Gates testified that he was present on the occasion when Mr. Solomon translated the letter described by Solomon; that he could speak the German language, and he and defendant "tried to read the letter, tried to make it out by ourselves," when Solomon came along, and he being proficient in the use of the German language was called in and translated the letter; that it contained some reference to some land, but witness could not remember the numbers, nor anything further, except that "it was some land transaction between the two," Joseph and Gustave. Defendant Gustave testified to an agreement between himself and Joseph Haas by which he was to surrender to Joseph the east half of section 3, and he and his wife were to have section 11; that in the purchase of the whole section and a half he and his wife, Belle, paid something like \$3,200, and Joseph had paid \$1,100, and the matter was adjusted by the division of the land, above indicated; that he had sought to redeem the whole section and a half, but, being unable to do so, he had surrendered the half section in section 3, and accepted section 11, thus canceling the indebtedness to Joseph for the money he had advanced. Some force is given to this contention by reason of the

execution of the deed of 1893 conveying section 11 alone and the retention of the land in section 3 by Joseph Haas. The parties to this transaction were all of German nationality, unacquainted with the usual formalities of real estate transactions, and much appears to have been left to memory.

The cause was tried to the district court, which resulted in a finding and judgment in favor of defendants Gustave and Belle Wellner that they were the owners of said section 11, and that plaintiffs had no interest therein. Judgment of dismissal of plaintiffs' petition and quieting the title of defendants was entered. Plaintiffs appeal.

It must be conceded that the evidence is not so clear and decisive in many particulars as could be desired, but, from as careful an examination and consideration as we are able to give it, we are led to the conclusion that the material facts are substantially as above stated.

It is contended by plaintiffs that the evidence does not show a delivery of the deed of 1893, and, as delivery is necessary to pass title, the deed is therefore of no validity; that, even if Catherine Haas was made the agent of her husband, Joseph, to make the delivery, as alleged in defendants' answer, the death of Joseph terminated that agency, and there could be no such delivery thereafter as would pass title. It may be conceded that such is the general rule upon both propositions, and yet, under the peculiar circumstances of this case, as disclosed from the evidence, we are of the opinion that it should not be applied here. Defendant Gustave was the stepson of Joseph Haas. He had been reared in the family and served his step-father until he was 23 years of age. Their relations appear to have been much the same as between father and son. Gustave and Belle had purchased the whole of the land and made a large number of the payments as they matured. We can discover no purpose on the part of Joseph Haas to deprive defendants of the money they had put into the purchase of the land. The person to whom he gave the deed for defendant was defendant's

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mother, and from her testimony, unsatisfactory as it may be, we think it more than probable that he considered the delivery to her the equivalent of a delivery to her son, or to the son's wife, should she come to Nauvoo. It sufficiently appears that, from motives of peace perhaps, he requested her to say nothing about the deed to the other children until later on, to our mind excluding the idea that he considered he had further dominion over it. The fact that Mrs. Haas should forget the transaction and omit to send the deed to the defendant is not surprising, nor that the presence of the deed in the papers of the estate failed to recall the matter to her memory, when we consider her age and almost absolute absence of knowledge of business affairs. In respect to the delivery, there appears to be a distinction between this case and those cited by plaintiffs. There also appears to be an element of equity in the case which should not be overlooked. If it is true, as suggested by the evidence, that Joseph Haas withheld and accepted the east half of section 3 as full compensation for the money advanced by him, a strong circumstance is added in favor of the contention that the delivery of the deed to defendant's mother was intended as a delivery to defendant, and neither he nor his heirs could successfully question defendant's title thereafter.

As we view the case upon the facts, which though somewhat dimly set forth in the record, we are persuaded that no serious question of law is involved, and the cases cited will not be noticed.

The judgment of the district court is

AFFIRMED.

ROSE, J., dissenting.

I dissent for the reason that in my opinion the evidence is insufficient to show a delivery of the deed dated March 21, 1893, in which Gustave Wellner is named as grantee.

LIZZIE O'DONNELL KULP, APPELLANT, v. BERNARD HEI-
MANN ET AL., APPELLEES.

FILED NOVEMBER 14, 1911. No. 16,554.

Guardian and Ward: SALE OF LAND: RATIFICATION. A final settlement between a guardian and his ward, after the ward has attended his majority, in the absence of fraud or misrepresentation, if made in a proper court, after investigation, and with knowledge on the part of the ward that a portion of the distributive share which he receives of his father's estate is the proceeds of a sale of his land, will amount to a ratification and affirmance of such sale, and the ward is thereby estopped to question its validity. *Borcher v. McGuire*, 85 Neb. 646.

APPEAL from the district court for Cuming county:
GUY T. GRAVES, JUDGE. *Affirmed.*

T. J. Mahoney and J. A. C. Kennedy, for appellant.

A. R. Oleson and Baldrige, De Bord & Fradenburg,
contra.

BARNES, J.

Action in ejectment to obtain possession of an undivided one-fourth of the northeast quarter of section 3, township 21 north, of range 5 east of the sixth P. M., situated in Cuming county, Nebraska. The cause was tried to the district court without the intervention of a jury. The trial resulted in a judgment for the defendants, and the plaintiff has appealed.

The errors assigned and relied on for a reversal are, in substance, as follows: The findings and judgment of the district court are contrary to law; the findings and judgment of the district court are not sustained by the evidence.

It appears that one James O'Donnell, on or about July 1, 1893, died testate in Cuming county, Nebraska, leaving a widow and three children surviving him, one of whom is the plaintiff in this action; that at the time of his death

O'Donnell left some land in Kansas, a timber claim in Garfield county, Nebraska, both of doubtful value, and two tracts of land in Cuming county, which are referred to in the record as the Monterey land and the Bancroft land. He also left personal property of the value of \$850. The Monterey land, which is the matter in dispute, consisted of 160 acres, and had been the homestead where O'Donnell and his wife and children had formerly lived for a number of years. A few years prior to his death O'Donnell purchased from the government of the United States an 80-acre tract, known as the Bancroft land, and moved his family, including the plaintiff, from the Monterey farm to the Bancroft land, which thereafter became the family homestead. At the time of his death there was due from him to the government upon the Bancroft land \$1,008, which constituted a personal obligation; and it may be further stated that a failure to pay this obligation would have resulted in the loss of the homestead, for upon such failure it would have reverted to the government. O'Donnell's will contained a bequest of \$200 to the church of Monterey, and a legacy to his sister of \$2,500, and devised, subject to other conditions, the testator's real property in four equal parts, giving to his wife and to his children each one-fourth thereof. The will also directed his executor to pay his funeral charges, the expenses of administration, and all of his debts out of his personal property; and further expressly provided that, if his personal property was insufficient, the executor should sell so much of his real estate as might be found necessary to accomplish that purpose. The will was admitted to probate, and one M. J. Hughes was appointed executor thereof. It appears from the evidence that the claims filed against the estate and the costs of administration amounted to \$563.13. There were some taxes due upon the land belonging to the estate, certain allowances were made to the widow for her support and the maintenance and support of the children, which, in addition to the legacies referred to in the will, amounted to about

\$4,300. The personal estate was sold for \$850.27. It appears that it became necessary for the executor to pay the \$1,008 due to the government in order to save the homestead known as the Bancroft land. Therefore the personal property left by the testator was insufficient to pay his debts and the charges against his estate. It further appears that it was impracticable to sell either the land in Kansas or the Garfield county timber claim; that the Bancroft land was occupied as a homestead, and it was deemed necessary to sell at least part of the Monterey land, which is the subject of this action, to pay the testator's debts. It is shown by the evidence that the executor thought it advisable not to rely wholly upon the power obtained in the will to sell the land in question, and an application was made to the district court for Cuming county for an order to sell so much of the Monterey land as should be found necessary to pay the testator's debts. The court found that the Monterey land could not well be divided, and made an order for the sale of the entire tract. The land was sold thereunder to one J. F. Losch for \$5,600, which the record shows was its full value at that time. The proceedings were examined, the sale was confirmed by the district court, and a deed was executed and delivered to the purchaser, who shortly thereafter sold and conveyed the land to the defendant Bernard Heimann, who immediately took possession of it, has made valuable and permanent improvements thereon, and has occupied it as his home for more than 17 years.

The plaintiff's main contention is that the district court, by reason of certain defects or irregularities in its proceedings, had no jurisdiction to make the order for the sale of the land in question; that the sale through which the defendants derived their title was void, and therefore she should have had the judgment. We may say, in passing, that it is probable that the matters upon which plaintiff relies to deprive the district court of jurisdiction to make the order were mere irregularities; but we are not required to pass upon that question, for we are of opinion

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that our decision must be ruled by *Borcher v. McGuire*, 85 Neb. 646, where practically the same questions were involved as those now presented for our determination. It appears that the plaintiff and the other heirs of the testator, after they attained their majority, with the consent and aid of the county court of Cuming county, settled with their guardian, accepted that portion of the proceeds of the sale of their land then in his hands, and consented to his discharge. The record in this case contains the following finding or conclusion made by the trial court. "The court further concludes, as a matter of law, that plaintiff, by reason of her knowledge at the time of her final settlement with her guardian that the money she received at said time was part of the proceeds of the sale of the land in controversy, and having elected to accept the money, is now estopped from claiming the land." The rule is well settled that in an action at law the findings of facts made by the trial court will be sustained, unless it appears from the evidence that they are clearly wrong. It is shown by the evidence in this case, beyond question, that plaintiff settled with her guardian, and accepted her share of the proceeds of the sale of the land which is now the subject of this controversy. She was a well-educated person and was possessed of more than average intelligence. She testified, among other things, that she knew, in a general way, what land her father had when he died, that she thought of it at the time she got her money, and that she knew the land in question had been sold. She also testified that she knew about her father's will, and of his bequest of \$2,500 to his sister, and that she knew what was left to her mother and the three children. She said: "I think I heard afterwards he left \$200 to the Monterey church. I think I heard it through my aunt." When asked when she first learned that the Monterey land was sold, she said: "I don't remember." She admitted, however, that it was before she made her settlement with the guardian. The other heirs testified that when they settled with the guardian they knew that

the money which they received was a part of the proceeds of the sale of the Monterey land. It further appears that they, together with the plaintiff, questioned the amount, and insisted that they ought to have more money from their father's estate; that Judge Krake, who was then the county judge of Cuming county, assisted in making the settlement. He testified that, together with the plaintiff and the other heirs, he went over the guardian's reports and the records in his office in relation to the matter, in order to satisfy them as to the correctness of the amount which they ought to receive; that they talked about the sale of the property, and that they were then referring to the property that executor Hughes sold; that after the examination they accepted the money from their guardian and consented to his discharge.

Without quoting any more of the evidence, we think it may be said that it was sufficient to support the findings of the district court. This brings the case clearly within the rule announced in *Borcher v. McGuire*, *supra*, where it was held that the acceptance of his distributive share, by a ward from his guardian, of an estate, and a request for his discharge; in the absence of fraud or misrepresentation, amounts to a ratification of the guardian's acts; that, if the ward has knowledge that a portion of the fund received by him was the proceeds of the sale of his land, this would be a ratification and affirmation of such sale, and it would make no difference whether the sale proceedings were regular, voidable, or void.

Counsel for the plaintiff have challenged the soundness of that opinion; but, after a careful review of it, we are unable to see how we could have decided the question otherwise. That was an action to recover another part of the real estate owned by James O'Donnell at the time of his death, and practically the same questions were involved in that case as those which are before us on this appeal. The record in this case contains practically the same evidence presented in that one, together with some additional testimony tending strongly to support the findings and judgment of the trial court.

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For the foregoing reasons, plaintiff's contention must fail, and the judgment of the district court is

AFFIRMED.

JOHN O'DONNELL, APPELLANT, v. BERNARD HEIMANN ET AL., APPELLEES.

FILED NOVEMBER 14, 1911. No. 16,555.

APPEAL from the district court for Cuming county: GUY T. GRAVES, JUDGE. *Affirmed.*

T. J. Mahoney and J. A. C. Kennedy, for appellant.

A. R. Oleson and Baldrige, De Bord & Fradenburg, contra.

BARNES, J.

This was an action in ejectment to recover possession of an undivided one-fourth of the same tract of land which was in controversy in *Kulp v. Heimann*, ante, p. 167. The pleadings were similar to those in that case, with the exception of a plea of the statute of limitations, which was there interposed. The evidence in both cases was practically the same. Defendants had the judgment, and the plaintiff has appealed.

Following the decision in that case, and for the reasons therein stated, the judgment of the district court is

AFFIRMED.

MARY O'DONNELL WEEKES, APPELLANT, V. BERNARD HEIMANN ET AL., APPELLEES.

FILED NOVEMBER 14, 1911. No. 16,558.

APPEAL from the district court for Cuming county:
GUY T. GRAVES, JUDGE. *Affirmed.*

T. J. Mahoney and J. A. C. Kennedy, for appellant.

A. R. Oleson and Baldrige, De Bord & Fradenburg,
contra.

BARNES, J.

This was an action in ejectment to recover possession of an undivided one-fourth of the same tract of land which was in controversy in *Kulp v. Heimann*, ante, p. 167. The pleadings were similar to those in that case, with the exception of a plea of the statute of limitations, which was there interposed. The evidence in both cases was practically the same. Defendants had the judgment, and the plaintiff has appealed.

Following the decision in that case, and for the reasons therein stated, the judgment of the district court is

AFFIRMED.

ELMER A. JOHNSON, APPELLEE, V. JAMES C. ISH,
APPELLANT.

FILED NOVEMBER 14, 1911. No. 16,925.

1. **Appeal: INSTRUCTIONS.** It is not reversible error to give to the jury an unnecessary instruction, which is a correct statement of a proposition of law, unless the complaining party appears to have been prejudiced thereby.
2. **Trial: REFUSAL OF INSTRUCTIONS.** Where the district court has fully and fairly instructed the jury upon a particular point, it is not error to refuse to give further instructions thereon.

3. **Assault and Battery: EXCLUSION OF EVIDENCE.** Assignment of error for the exclusion of certain evidence commented on, and found to be without merit.
4. —: **DAMAGES.** In an action for damages for assault and battery, where the testimony was conflicting as to the nature and extent of the plaintiff's injuries, a judgment should not be held excessive if the record contains substantial evidence supporting it.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Affirmed.*

Byron G. Burbank, for appellant.

W. W. Slabaugh and *J. W. Battin*, *contra.*

BARNES, J.

Action in the district court for Douglas county to recover damages sustained by the plaintiff from an assault and battery alleged to have been committed upon him by the defendant. The plaintiff had a verdict for \$1,000. The court required him to remit therefrom the sum of \$400. A remittitur was filed, and the court thereupon rendered a judgment for the plaintiff for \$600 and costs. The defendant has appealed.

Defendant contends that the court erred in giving instruction numbered 7, which reads as follows: "Plaintiff claimed that the defendant assaulted him maliciously. The law infers malice where an act is done without legal excuse, and where in itself it amounts to an unwarranted assault upon another. An act done with legal excuse is without malice." The argument is that, because malice was not alleged in the petition, it was error for the court to instruct the jury upon that question. While the word "malice" is not found in the plaintiff's petition, still the facts alleged therein, and which were established by the evidence, were sufficient to constitute malice in its legal sense, and while it is probable that the instruction was unnecessary, still, as an abstract proposition of law, it was correct and affords the defendant no ground for a new trial.

Defendant assigns error for the refusal of the court to give the jury paragraph 6 of the instructions requested by him. This instruction was, in substance, that in no event could the plaintiff recover punitive damages under the laws of this state, and the damages recoverable were only those actually flowing from the blow inflicted upon the plaintiff's head. Of this argument, it is sufficient to say that the trial court fully covered that point by paragraph 10 of the instructions given on his own motion, and therefore was not required to further instruct the jury upon that question. *Bush v. State*, 47 Neb. 642; *Brumback v. German Nat. Bank*, 46 Neb. 540; *Beavers v. Missouri P. R. Co.*, 47 Neb. 761.

Defendant further contends that the district court erred in instructing the jury that, although they should find from the evidence that the defendant was fire reporter, and was wearing a policeman's star, such position and star gave him no other and further rights to remove persons from the pasture in controversy than that possessed by any individual in possession or under control of said pasture. It appears that defendant, at the time the assault was committed, was a fire reporter of the city of Omaha; and, it is claimed by defendant's counsel, was a special policeman. It further appears that plaintiff, with others, was engaged in playing base ball in a pasture lot in the city of Omaha, of which the defendant's mother was the lessee; that when the defendant was informed that the game was in progress he put on his uniform, also a policeman's badge, took a policeman's club, and, accompanied by his wife, went to the pasture, as he stated, to order the players to leave the inclosure. It appears that when he arrived there he seized a boy of the name of Kennedy by the collar and started to take him to the patrol station; that plaintiff and others (who were grown men) remonstrated with defendant, and asked him to let the boy go, and stated that, if he desired to arrest any one, to arrest one of them; that defendant's wife seized the ball bats used by the players,

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and proceeded to carry them away; that one Powell, who was behind Mrs. Ish, pulled his bat from under her arm and threw it out of the field. She made an outcry, and thereupon the defendant released the boy and started for the other players, and struck, or struck at, them with his club; that they left the field, and the plaintiff said to defendant, in substance: I have known you for a number of years. We did not mean anything wrong. I do not like to see you act this way. To which defendant replied: "Get out of here." Plaintiff then said: "I will; just give me time," and walked towards the fence. Defendant followed him, and struck him on the head with his club, and this is the assault which was the foundation of this action. We think, that under this state of facts, the instruction complained of was correct, for it cannot be seriously contended that either the boy (Kennedy) or the plaintiff was found in the overt act of committing such a crime as would authorize the defendant, even if he was a special policeman, to arrest either of them without a warrant from some competent authority. Therefore the jury were properly told that the defendant had no further or greater right to remove the persons from the inclosure than was possessed by any individual in possession or control of the pasture.

It is further contended that the court erred in refusing to instruct the jury that they should disregard all of the testimony relating to any alleged assault by the defendant upon two of the other players, named Powell and Dart. An examination of the abstract discloses that this point was fully and explicitly covered by a similar instruction given by the court upon his own motion, and therefore the request was properly refused.

Error is assigned for the refusal of the court to allow Mrs. Ish to testify of her physical condition at the time when the transaction above described took place; and it is argued that the plaintiff was justified in going to her assistance; but it is not claimed that the plaintiff had assaulted her, or had even spoken to her, and the fact

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that Powell had taken his ball bat from her and thrown it into the street afforded the defendant no excuse for afterwards assaulting and striking the plaintiff while he was in the act of leaving the pasture. We are therefore of opinion that the court did not err in excluding this evidence.

Finally, it is contended that the judgment is excessive. It appears that the evidence as to the nature and extent of plaintiff's injuries was somewhat conflicting. It was clearly shown, however, that the blow from defendant's club knocked the plaintiff down and cut a gash in his scalp deep enough to reach the bone; that it rendered him at least partially unconscious; that he bled profusely, and was compelled to wear a bandage upon his head for some time; that since then he has suffered from attacks of dizziness, and at the time of the trial was still suffering from the effects of his injuries. The jury, upon consideration of all of the evidence, returned a verdict in plaintiff's favor for \$1,000, which upon due consideration the trial court reduced to \$600. From a careful review of all of the evidence, we are unable to say that the judgment is excessive.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

JOSEPH TIERNEY ET AL., APPELLEES, V. ANDREW R. OLESON
ET AL, APPELLANTS.

FILED NOVEMBER 14, 1911. No. 17,048.

1. **Mortgages: FORECLOSURE: CONFIRMATION OF SALE: SUIT TO SET ASIDE: BURDEN OF PROOF.** In a collateral action to set aside an order confirming a sheriff's sale under a decree of foreclosure and the deed executed in compliance with such order, for the reason that the order was obtained fraudulently in violation of the plaintiff's rights, and contrary to a verbal agreement not to ask for such confirmation, if the allegations of plaintiff's petition are

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denied by the answer, the burden is upon the plaintiff to prove the allegations of his petition by a preponderance of the evidence.

2. Evidence examined, its substance stated in the opinion, and held insufficient to sustain a judgment for the plaintiff.

APPEAL from the district court for Cuming county:
GUY T. GRAVES, JUDGE. *Reversed with directions.*

A. R. Oleson and John A. Ehrhardt, for appellants.

Clinton Brome and O. C. Anderson, contra.

BARNES, J.

Action in the district court for Cuming county to vacate and set aside an order confirming a sale of real estate made under a mortgage foreclosure decree, and to cancel the sheriff's deed made to the purchaser. The plaintiffs had the judgment, the defendants have appealed, and the case is now before this court for a trial *de novo* upon the record and bill of exceptions.

It sufficiently appears that on or about the 21st day of May, 1904, one John Tierney, Sr., conveyed by warranty deed to his daughter, Anna Cunningham, the south half of the southeast quarter of section 25, and the northeast quarter of the northeast quarter of section 36, township 24, range 6 east, in Cuming county, Nebraska, which he then owned in fee simple, subject to a mortgage to the Security Mutual Life Insurance Company for \$3,000, reserving to himself an annuity therein of \$300 a year during the remainder of his life; that Anna Cunningham and her husband, Martin, went into possession of the land and performed their part of the agreement; that they mortgaged the premises to John Tierney, Sr., for the sum of \$300; that the plaintiffs in this action, who are children of John Tierney, Sr., were dissatisfied with their father's disposition of his property, and in June, 1906, commenced an action in the county court of Cuming county to have their father declared incompetent, and for the appointment of a guard-

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ian of his person and estate, in order to lay a foundation for setting aside his deed to the Cunninghams; that a long and tedious period of litigation ensued, in which Andrew R. Oleson, the principal defendant herein, acted as attorney for John Tierney, Sr., and the Cunninghams, and, to pay him for his services, they gave him their two promissory notes, aggregating \$750, secured by a mortgage upon the land above described; that, for a failure to pay the mortgage above mentioned, Oleson commenced an action in the district court for Cuming county, and in November, 1908, obtained his decree of foreclosure; that thereafter the land was duly appraised, advertised and sold by the sheriff of Cuming county to defendant Oleson; that the proceedings in that action were regular and valid in all respects, and thereafter Oleson was entitled to an order confirming the sale at any time he should make application therefor. It further appears that while the action for the appointment of a guardian of the person and estate of John Tierney, Sr., was still pending upon an appeal to the district court for Cuming county, and on the 25th day of January, 1909, one H. C. Brome, acting as attorney for the plaintiffs herein, who were the plaintiffs in the proceeding for the appointment of a guardian, as above stated, went to Wisner and entered into an agreement with Martin and Anna Cunningham, which provided, in substance, that the Cunninghams were to sell the land in question, and out of the proceeds were first to pay the mortgage liens above mentioned, and, second, to the plaintiffs herein the sum of \$3,125, and the balance, if any arising from such sale, was to be retained by the Cunninghams; that 60 days were given Cunningham in which to make the sale, and, if he should fail to do so, then the plaintiffs were to have an opportunity to sell the premises upon the same conditions, and, as a consideration for the agreement, plaintiffs were to dismiss the proceeding for the appointment of a guardian for John Tierney, Sr. The above mentioned agreement was afterwards typewritten by

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defendant Oleson at the request of the parties thereto, but it seems clear that Oleson took no other part in that transaction.

It was alleged by the plaintiffs, as a basis of their right of action in this case, that, when the agreement above described was concluded, it was further agreed between H. C. Brome (as attorney for the plaintiffs) and the defendant Andrew R. Oleson that Oleson would not ask for a confirmation of sale until after the February term of court; that the defendant Oleson, in violation of his agreement, and in fraud of the rights of plaintiffs, and without notice to them, obtained a decree of confirmation and a sheriff's deed to the premises in question, which the plaintiffs in this action ask to have set aside, declared void and canceled. On the other hand, defendant Oleson, by his answer, denied that he ever made any agreement in relation to the matter with the plaintiffs by and through their attorney, H. C. Brome, and alleged that at the time when the agreement first above mentioned was concluded he informed the parties thereto that he would not postpone his application for a confirmation of sale indefinitely, but, in order to accommodate his former clients, the Cunninghams, he would not ask for a confirmation of sale at the February sitting of the court, which was to begin immediately thereafter, and on the 1st day of February, 1909; that he positively declared that he would make no arrangement whatever with attorney Brome or the plaintiffs herein; that, according to his promise made to the Cunninghams, he refrained from asking for a confirmation of sale at the February sitting of the district court, and made no application therefor until more than 60 days had elapsed, in order to give his former clients an opportunity to sell the premises and carry out the terms of their agreement with the plaintiffs.

It appears that the district court adjourned at the conclusion of its February sitting, which was of short duration, until the 10th day of May, 1909; that in the

latter part of March, and more than 60 days after the agreement between the plaintiffs and the Cunninghams was entered into, Oleson saw the Cunninghams, who were the only persons who had the right to redeem the land in question from the foreclosure sale, and inquired how the matter of sale was progressing; that Martin Cunningham then informed the defendant Oleson that he had been unable to sell the land, that his time limit had expired, and he had nothing further to do with the matter; that Oleson then informed him that he should ask for a confirmation of sale at his first opportunity; that, when court convened on the 10th day of May following, defendant Oleson obtained the first order of confirmation, and on the following day the sale was confirmed, a deed was ordered, which was made by the sheriff, and was thereafter placed on record by the defendant Oleson.

It thus appears that the only question for determination in this case is whether or not the defendant Oleson made the agreement with plaintiffs' attorney, H. C. Brome, as alleged in their petition, and upon this issue the burden of proof rests upon the plaintiffs to establish the making of that agreement by a preponderance of the evidence.

It appears from the record and bill of exceptions that upon that issue the plaintiffs produced Mr. Brome as a witness, who testified, in substance, that, when the agreement between his clients and the Cunninghams was completed, he said to Mr. Oleson: "Now, I understand you have a mortgage decree, and sale has been made and not confirmed on this property. Mr. Cunningham tells me that you are perfectly willing to wait until we sell this property for your money; that the sale won't be confirmed until we make this arrangement, and I want this understood between us," that Mr. Oleson said, "that would be all right." He further stated that there was no other conversation between them about the confirmation.

On the other hand, it appears that, by his testimony,

Mr. Oleson positively denied that he ever had any such conversation with, or made any such statement to, Mr. Brome. He further testified that he had no conversation or agreement of any kind with Mr. Brome relative to the confirmation at all. He further stated, in substance, that, when the printing of the contract was completed, Mr. McGuire, who was present, asked him to withhold confirmation of sale for Mr. Cunningham, and that he told McGuire and Cunningham, who was also present, that he would withhold confirmation in abeyance over the February sitting of the court. That he said to Cunningham: "Martin, if you ask it, I will for you, but I will not, under any circumstances, for the other parties. * * * I want you to understand that this is not going to be indefinite." That Cunningham said to him: "It won't be long, because I think we will close the sale up inside of 30 days." That he then said to him: "I will pass it over the February sitting of the court, so you will have your opportunity to make arrangements that you are now contemplating." That the February term of court convened on the 1st day of February, 1909; that he did pass the confirmation over that sitting of the court. He further stated that about the latter part of March, somewhere about the expiration of the 60-day period mentioned in the contract, he saw Mr. Cunningham in town, and asked him how he was getting along with the sale of that land; that Cunningham said: "I haven't been able to sell it. We have tried and have had a number of buyers for it, but for some reason or another they won't buy or close the deal." That he then said to Martin: "If that is the way it is going to hang on, I am not going to wait much longer for the confirmation of that sale." That Cunningham replied: "I have done everything I can. Now, my time is up, and I have nothing more I can do with it. It goes over to the other parties." That he then said to Cunningham: "Martin, I shall ask for confirmation at the first opportunity." Cunningham said: "I can't help it. It has

gone beyond me. I was unable to sell it, and I have tried very hard." That he then said to Cunningham: "I don't intend to wait until somebody or other gets * * * into the matter. I made arrangements with you, and I want to carry them out." That Cunningham said: "You have done everything I asked you. I can't do anything further. I am out of it. * * * That is the substance of the conversation."

Mr. McGuire, by his testimony, corroborated the testimony of Mr. Oleson. It also appears that the plaintiffs took the deposition of Martin Cunningham to maintain the issues on their part, but did not offer it in evidence on the trial. It was read in evidence by the defendants to support their view of the case, and it fully corroborates the testimony of Mr. Oleson. It appears, without dispute, that, when the district court convened again on the 10th day of May, 1909, Oleson moved for a confirmation of the sale, and the court made the first order to show cause by the following morning why the sale should not be confirmed. No cause was shown, the sale was confirmed, and the deed ordered. It further appears, without dispute, that no notice of the motion to confirm the sale other than that of the first order was given to the plaintiffs, and that, as a matter of fact, they did not know until some time after the order of confirmation was entered that the sale had been confirmed.

There was other testimony in the case upon other questions, but the foregoing comprises the substance of all of the evidence introduced by either party upon the main issue. As we view the record, the plaintiffs failed to sustain the allegations of their petition by a preponderance of the evidence, and therefore the judgment of the district court was wrong and should be reversed.

It may be further said that the record discloses that the land was sold subject to the mortgages of the Security Mutual Life Insurance Company and John Tierney, Sr.; that, after the order of confirmation was entered the

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proceeds of the sale were distributed, and, after the payment of costs, there remained a surplus in the hands of the court amounting to \$1,468.70, which was paid to and receipted for by the defendants Martin and Anna Cunningham.

It may be further said that there is nothing in the record to show that the land was sold for an inadequate price; and, while some evidence was produced which tended to show that the land at the time of the trial was worth about \$12,000, still there was no offer on the part of the plaintiffs to pay that sum for it. Neither was it shown that there was any reasonable prospect of their selling the land for any amount in excess of the sum bid for it at the sheriff's sale.

We gather from the record that it would be useless to send this case back to the district court for a new trial, for it seems clear that no other or further evidence can be produced by either party.

For the foregoing reasons, the judgment of the district court is reversed, and the plaintiffs' action as against the defendants Andrew R. Oleson, Helen Oleson, Martin Cunningham and Anna Cunningham is hereby dismissed; and it appearing that the defendant the Security Mutual Life Insurance Company has prayed that its mortgage be not foreclosed, but that it only be declared a first lien upon the land in question, it is so found, and the action is dismissed without prejudice to any of its future rights. It further appearing that defendant John Tierney, Sr., has not asked for a foreclosure of his mortgage, the action as to him is dismissed without prejudice to the right to maintain a future foreclosure suit.

JUDGMENT ACCORDINGLY.

SEDGWICK, J., dissenting.

John Tierney, Sr., had a farm in Cuming county, which is said by one of the witnesses to be worth \$12,000, and he also had several lots in Scribner. There was a mortgage on the farm of \$3,000, so that Tierney's in-

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terest in it was not worth more than \$8,000 or \$9,000. Tierney had several children. One of them, Anna, was the wife of Martin Cunningham. In May, 1904, Tierney deeded the farm to his daughter, Anna Cunningham, and reserved an annuity of \$300 to himself. This would be about one-third of 10 per cent. of the value of Mr. Tierney's interest in the farm. This annuity was to be continued only during the life of Mr. Tierney, who was quite an aged man, so that the transaction was virtually a gift of the farm to Anna, to the exclusion of his other children. His other children then filed a petition in the county court to have a guardian appointed for Mr. Tierney. This proceeding was evidently with the view of testing the validity of the deed to Anna and their exclusion from their father's property. It was eventually before this court, and was remanded to the district court for Cuming county for trial, and had been tried in the district court for Cuming county before a jury, when the contract that is involved in this litigation was made. The jury apparently found that Mr. Tierney was competent to take care of himself, but did not find that he was competent to take care of his property, and it appears that this question was about to be tried again, when this contract was made. Mr. Oleson acted for Anna and Martin Cunningham in their litigation, and, of course, in their interest appeared for Tierney to prevent his being held incompetent. On the 25th day of January, 1909, Mr. Brome, who was attorney for the other children of Tierney, went out there, and the parties appear to have gotten together, and a settlement of the whole matter was entered into. Mr. Oleson claims that he took no part in making the settlement but he does not claim that it was made clandestinely. He was notified of it; in fact, he wrote the contract on the typewriter, so that he knew just exactly what settlement they were making. The contract they made was to the effect that Cunningham should pay the other heirs \$3,125 as their interest in the land, and the other heirs were to dismiss the pro-

ceedings in the district court, where the matter was being contested, and release all their claims to the land. The Cunninghams were to sell the land, and the contract provided that they should do so within 60 days, and pay the other claims against the land, the \$3,125 to their brothers and sisters, and that they, the Cunninghams, should have the remainder. If the Cunninghams did not sell the farm within 60 days, the contract provided that the other children should have the right to sell the land for the sum of \$12,000, and out of the proceeds pay the liens and their \$3,125, and the balance to the Cunninghams. The next term of the district court, after this agreement, was to take place within ten days or two weeks. Mr. Oleson testified that at the time this contract was written by him on the typewriter, and before it was executed, while the parties were there in his office together, Mr. Cunningham told him (Oleson) what they had agreed to do. He had conversation with Mr. Cunningham and Mr. McGuire, who was present. Mr. Oleson had obtained a decree of foreclosure of his mortgage for attorney's fees against this farm given by the Cunninghams, and the farm had been sold a few days before this contract at sheriff's sale, but the sale was not yet confirmed. Mr. Oleson testified that McGuire mentioned to him the matter of holding the decree of confirmation in abeyance when they were making this contract in Oleson's office, and Oleson says: "I stated that, if Mr. Cunningham wished it, I would hold the confirmation in abeyance over the February sitting of the court." Mr. Cunningham said: "Well, I guess I will ask it." And Oleson said: "Martin, if you ask it, I will for you, but I will not, under any circumstances, for the other parties; but Martin, I want you to understand that this is not going to be indefinite." Mr. Oleson's case depends upon this transaction. It will be remembered that the contract of settlement provided that Cunningham should have 60 days in which to make the sale, and afterwards his brothers and sisters might sell the land for \$12,000,

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and that this settlement was impossible unless Oleson would forbear to insist upon the confirmation, and that Cunningham might make this contract and settlement. Oleson agreed that he would forbear, but not indefinitely, to ask for a confirmation. Oleson's construction of it is that he would wait for Cunningham to see if he could sell it, and, if Cunningham could not sell it, then he would be at liberty, with Cunningham's consent, to have his sale confirmed. Acting upon this understanding, and about the time the 60 days expired, Oleson asks Cunningham if he has made the sale, and Cunningham tells him he has not, and that he cannot do so, and Oleson has his sale confirmed and pays to Cunningham \$1,400. When this contract was made, and in pursuance of it, Oleson applied to the district court and had the proceedings for the guardianship against Tierney dismissed on the ground that the contract which the parties had entered into was a complete settlement of the whole matter. Thus Oleson and Cunningham get the proceedings against them dismissed. They get the entire farm. Cunningham gets \$1,400 out of it, Oleson gets the farm, and the other heirs get nothing.

Evidently Oleson is mistaken in supposing that by his agreement to delay the confirmation he placed himself under obligation to his client Cunningham only. He knew what the parties were agreeing to do, and that those who were contesting with his clients would not enter into this contract if the sale was to be confirmed without their knowledge, and so as to give the entire property to Oleson and his client, without giving them an opportunity to avail themselves of that part of the agreement that was in their interest, Oleson agreed to the entire contract and so became a party to it; and whether it was at the request and for the benefit of his client, Cunningham, or for his own benefit, or both, would make no difference. His mortgage was given by the Cunninghams. Oleson's interest in the property depended upon the validity of the deed from Tierney to

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Anna Cunningham. That deed was being contested, and it was a part of the contract of settlement, to which Oleson agreed, that this contest should be dismissed and the title perfected so that the terms of the contract of settlement might be carried out. Oleson procured the dismissal of this contest, which he could not have done except under the terms of the contract of settlement, and then proceeded upon a secret agreement between himself and his client, and without any notice to the other parties to the settlement, to confirm his foreclosure sale and procure the whole property for himself and his client. Cunningham, he says, told him that he could not find a purchaser for the farm; but Cunningham had never notified the other parties to the agreement of settlement of this fact. By the terms of the agreement the other parties were to have an opportunity to sell the farm after Cunningham had failed to make such sale. Oleson and Cunningham should have frankly told the other parties that Cunningham could not make the desired sale of the property, and so give them an opportunity to make such sale. The contract of settlement expressly provided for this, and Oleson and his client violated the contract by depriving the other party of an opportunity to sell the farm as the contract provided.

I think the judgment of the trial court was right.

S. H. KYNER, APPELLEE, V. FREDERICK WHITTEMORE,
APPELLANT.

FILED NOVEMBER 14, 1911. No. 17,083.

1. **Pleading: ANSWER: WAIVER OF DEMURRER.** By answering to the merits, a defendant waives his right to demur to the plaintiff's petition, and that part of his answer which in form amounts to a general demurrer will be treated as surplusage.
2. **Taxation: FORECLOSURE OF LIEN: ANSWER: DEMURRER.** Where a defendant seeks to defeat the foreclosure of a tax lien on the

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ground that the real estate in question consisted of two separate and distinct tracts which were the property of different owners, and were assessed and taxed as one tract, if his answer fails to clearly set forth facts sufficient to warrant such a conclusion, and contains no definite description of each separate tract, it is vulnerable to a general demurrer.

3. ———: ———: ———. An allegation in an answer that defendant has at all times been ready and willing to pay his proportion of the tax, but has been unable to agree with another alleged owner as to the amount he should be required to pay, does not constitute a defense to an action to foreclose a tax lien.

APPEAL from the district court for Brown county:
WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

William M. Ely, for appellant.

J. S. Davisson, *contra*.

BARNES, J.

Action in the district court for Brown county to foreclose a tax lien upon the northwest quarter of the northwest quarter of section 31, township 30 north, range 20 west of the sixth P. M. The petition was in the usual form, and alleged, in substance, that the land in question (describing it) was duly assessed for taxation for the year 1887; that taxes were duly levied thereon for that year; that the taxes were not paid; that the land was advertised according to law, and was finally sold at private sale to one W. A. Bucklin on the 12th day of August, 1902, for the taxes above mentioned, interest, penalties and costs, amounting to \$78.20, and a certificate of sale was duly issued to the purchaser therefor; that the certificate was assigned to the plaintiff on the 12th day of January, 1905, and that he is the holder and owner thereof; that the land has never been redeemed from said tax sale, and no part of said tax has been paid; that a treasurer's deed cannot be lawfully issued at this time upon said certificate; that the plaintiff has paid subsequent taxes upon said land for the years 1901, 1902 and

1903, in the sum of \$10.46; that the defendants Lizzie M. Kyner and Frederick Whittemore have, or claim to have, some interest in the said premises, but whatever right or claim they may have therein is junior and inferior to the claim of the plaintiff; that there is now due and unpaid on the tax certificate and subsequent taxes paid the sum of \$184.49. The petition concluded with a prayer for a foreclosure of the tax lien, for an attorney's fee as provided by law, and other and further just and equitable relief.

To this petition the defendant Frederick Whittemore filed an answer, alleging, in substance: First, that the facts stated in the petition were not sufficient to constitute a cause of action; second, that on the 1st day of April, 1887, the land in question consisted of two separate and distinct tracts, and that they both were assessed together as one tract; but the answer failed to give any particular or definite description of each of the alleged separate tracts by metes and bounds, or otherwise, sufficient to enable the court to distinguish or describe them.

It was further alleged that on the 1st day of April, 1887, one of said tracts was owned by one W. L. Whittemore, and the other was owned jointly by C. R. Glover and W. L. Whittemore, and that on one of said tracts, consisting of about five acres, was located a flour and grist-mill, known as the Glover mill; that on the 30th day of July, 1887, C. R. Glover and W. L. Whittemore conveyed all of the land in question as one entire tract to the Northwest Christian Assembly and Chautauqua; that on the 12th day of August, 1887, the Northwest Christian Assembly and Chautauqua conveyed back to said Glover and Whittemore that part of said premises upon which Glover's mill was located, consisting of about 2.90 acres; that ever since said last mentioned date said 44 acres of land has comprised two separate and distinct tracts, the one consisting of 2.90 acres, and known as the Glover millsite, and the other consisting of

about 41 acres, known as the Chautauqua grounds; that the answering defendant is now the owner in fee simple of that portion of the northwest quarter of the northwest quarter of section 31, township 30, last above mentioned.

It was also alleged that, through some error or mistake on the part of the officers whose duty it was to list and assess the land for taxation, the two parcels of land were assessed and listed together as one tract in the year 1887, and were described as the northwest quarter of the northwest quarter of section 31, township 30, range 20, containing 44 acres; that the tax which the millsite should bear would amount to \$27.64, and the Chautauqua ground share thereof would amount to \$4.61. It was also stated in the answer that, at all times since learning that the said 1887 tax on said land was unpaid, the answering defendant has stood ready and willing to pay his just proportion of the same, with legal interest and penalties thereon, and that he is still ready and willing to pay the same, but that he has been prevented from paying the taxes by reason of his inability to reach any agreement with the owners of the remainder of said land as to the proportion of the tax which each should pay.

The answer concluded with a prayer that the court ascertain the proportion of the taxes justly chargeable to the defendant's 41 acres, known as the Chautauqua grounds, and that, if the court should find that the plaintiff's tax sale certificate is a lien upon the answering defendant's portion of the said real estate, the court ascertain and determine the amount thereof, together with the amount of costs chargeable against said tract.

To this answer the plaintiff filed a general demurrer, which was sustained. The answering defendant refused to further plead, and the court, after entering a default against the non-answering defendants, rendered a decree of foreclosure in accordance with the prayer of the petition, and the defendant has appealed.

It is contended that the answer contained two defenses, and that both of them were not vulnerable to a

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general demurrer, therefore the demurrer should have been overruled. In this we think the appellant is mistaken. While the answer to the petition contains language usually employed in a general demurrer, still the defendant answered to the merits, and thereby waived his demurrer. It is well settled that a general demurrer and an answer to the merits are so inconsistent that they cannot be both considered as constituting a single pleading in the form of an answer.

It is argued that the appellant has shown by his answer that the land described in the petition was in fact two tracts owned by different parties, but was listed, assessed and taxed as one; and he asks the court to ascertain and determine the amount of taxes, interest and costs chargeable to each particular tract decreed, and therefore his answer stated a defense to the plaintiff's petition, and it was error for the district court to hold that it was vulnerable to a demurrer.

An examination of the answer satisfies us that it is insufficient in both form and substance to bring this case within the rule announced in *Spiech v. Tierney*, 56 Neb. 514, or enable the court to ascertain the amount of the lien justly chargeable to each of the alleged separate portions of the 40-acre tract of land upon which the tax was levied. It contains no definite description of either of the alleged separate tracts. It is not shown that the conveyances mentioned in the answer were recorded, or that the taxing authorities had any means of ascertaining that the land was divided into two separate tracts, or that it was owned by more than one person; and the answer fails to disclose any reason why the taxing officers should not assess the entire tract in the usual manner as the smallest governmental subdivision, and levy taxes thereon accordingly. It is conceded by the answer that the tax has not been paid, and the only reason assigned for the non-payment is the alleged inability of the answering defendant to agree with the alleged owner of the other part of the 40 acres as to the

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amount of the tax that each should pay. We think it will not be seriously contended that such an allegation is sufficient to constitute a defense to an action to foreclose the tax lien.

As we view the pleadings in this case, the demurrer to the answer was properly sustained, and the decree of the district court is

AFFIRMED.

ORPHA A. CLAYPOOL, APPELLEE, v. WILLIAM ROBB,
APPELLANT.

FILED NOVEMBER 14, 1911. No. 16,944.

1. **Taxation: FORECLOSURE OF LIEN: PUBLICATION OF NOTICE.** The provision of section 79 of the code that "the publication must be made four consecutive weeks" is satisfied by a publication in a weekly newspaper once in each week for four weeks successively. *Davis v. Huston*, 15 Neb. 28.
2. ———: ———: ———. But, where the notice is published in a paper having more than one issue during the week, insertion of the notice in each of the regular issues during the week is necessary to a complete publication of the notice for that particular week.

APPEAL from the district court for Lincoln county:
HANSON M. GRIMES, JUDGE. *Affirmed.*

John A. Sheean, for appellant.

John N. Dryden and *Albert Muldoon*, contra.

LETTON, J.

This is an action to set aside a deed to a tract of land, which is based upon certain tax foreclosure proceedings, and to be permitted to redeem from the lien of the taxes. The jurisdiction of the court in the foreclosure suit is attacked upon several grounds, only one of which is

necessary to be considered. The service upon the defendant in that action was by publication. The notice was published in a semi-weekly paper, which was issued on Tuesdays and Fridays. The first notice was published on Friday, February 14, 1902, and the last on Friday, March 7, 1902, and it was published in each issue of the paper in the intervening time.

The district court found that the publication of the notice was not continued for the requisite length of time, and that the court acquired no jurisdiction to foreclose the tax lien. The question involved is not free from doubt. Section 79 of the code requires that "the publication must be made four consecutive weeks." Section 80, so far as applicable, is as follows: "Service by publication shall be deemed complete when it shall have been made in the manner and for the time prescribed in the preceding section." Speaking of these provisions in *Davis v. Huston*, 15 Neb. 28, it is said by COBB, J.: "It is well known to the profession that it has uniformly been understood in this state the same as though the language were that the notice should be printed or inserted in a weekly newspaper once in each week for four weeks successively, etc., and that the publication is deemed complete upon the distribution of the newspaper containing its fourth successive weekly insertion." In *Alexander v. Alexander*, 26 Neb. 68, we construed "three weeks successively" to mean once each week for three successive weeks. Where, however, the statute requires a publication to be made "for" a certain number of days or weeks, the court has uniformly construed this to mean "during" the time specified. In *State v. Hanson*, 80 Neb. 724, 737, the previous cases are reviewed, and it is said: "Where the time mentioned by the statute expresses the duration of the notice, the same must be published for and during the time mentioned. Where, however, the time mentioned indicates only the number of times the notice is required to be published, it is satisfied if the notice is published the number of times mentioned." *Lawson v. Gibson*, 18

Neb. 137; *State v. Cornell*, 54 Neb. 647; *State v. Cherry County*, 58 Neb. 734.

It is clear that, if the paper in which the publication was made had been published weekly, a notice published on four Fridays would have been sufficient. We think, however, that, while the statutory requirement is satisfied by publication in four successive issues of a weekly newspaper, publication in the entire number of issues for each week is necessary to constitute a weekly publication in a paper having more than one issue in each week. In other words, publication in all the regular issues of the paper during the week, whether daily, semi-weekly or weekly, is necessary to the complete publication of the notice for that particular week. *Sterens v. Naylor*, 75 Neb. 325; *Union P. R. Co. v. Montgomery*, 49 Neb. 429; *Union P. R. Co. v. McNally*, 54 Neb. 112. In the cases cited the publication was required to be "for" the time specified, but we think the decision in this case does not rest upon that distinction, but on the thought that a publication is not complete for any week, unless inserted in every issue of the paper for that week. If we consider each week as beginning on Sunday, the publication for the first week was insufficient, since it did not appear in the two issues of the paper; while, if we consider that each week consists of seven days, beginning with the date of the first publication, the notice is equally insufficient, since there was a later issue of the paper in the last week of publication in which the notice did not appear.

Under this rule, it is apparent that the notice was not published four successive weeks. We are not unmindful of the fact that a number of courts have held that under a similar statute a publication in a daily or semi-weekly newspaper once in each week is sufficient, but this court has always been inclined to construe with strictness the provisions of the statute allowing constructive service. We are satisfied with the conclusion arrived at by the district court, and its judgment is

'AFFIRMED.

RODMAN W. FISKE, TRUSTEE, APPELLEE, v. EDWARD F. MAYHEW ET AL., APPELLANTS.

FILED NOVEMBER 14, 1911. No. 16,953.

1. **Mortgages: DEED OF TRUST: DISTINCTION.** "A deed of trust is a mortgage, and only differs from a mortgage with a power of sale, in its being executed to a third person, instead of a creditor." *Hurley v. Estes*, 6 Neb. 386.
2. ———. "When an instrument is given as security for the payment of money, or the performance of some collateral act, it is a mortgage, whatever may be its form." *Hurley v. Estes*, 6 Neb. 386.

APPEAL from the district court for Hamilton county:
GEORGE F. CORCORAN, JUDGE. *Affirmed.*

J. H. Grosvenor, for appellants.

T. J. Doyle, G. L. De Lacy, R. M. Proudft and R. R. Horth, contra.

LETTON, J.

Edward F. Mayhew, a dealer in agricultural implements at Friend, Nebraska, being indebted to a number of creditors, on February 23, 1907, executed a conveyance to Rodman W. Fiske, trustee. The first portion of this conveyance is in form a warranty deed, then follows a provision that the trustee shall have immediate possession of the land and the right to the crops, a recital that "this conveyance is made for the use and benefit of all parties hereinafter named; and said Edward F. Mayhew being indebted to the said parties in the respective sums set forth, as follows, to wit: Moon Brothers Carriage Company \$702," etc., setting forth the names of each creditor and the amounts due each severally. It is next provided that the trustee "shall place the premises upon the market for sale, use due diligence to sell the same to the best possible advantage and to obtain the best price he can therefor,

hereby giving to him full power to sell the same at public or private sale at such time as he shall deem best, and from the proceeds" he shall pay the creditors in proportion to their claims, and the residue, if any, shall be paid to Mayhew. Next follows the following provision: "This instrument shall not be construed as a mere mortgage, it being the design and purpose of the grantors herein to clothe the said Rodman W. Fiske with plenary power to make an absolute sale and conveyance of said premises for the purposes herein expressed, and to that end the said grantors hereby constitute, create and make the said Rodman W. Fiske their attorney in fact, without the power of revocation, to make sale of said premises and deed of conveyance of the same vesting an indefeasible title in the purchaser thereto."

This action was brought to foreclose the trust deed. The plaintiff takes the position that the instrument, though in form a warranty deed with a power of sale, is in fact a mortgage, and that foreclosure is necessary in order to cut off the equities of the defendants and convey a valid title to a purchaser. The defendants insist that the instrument is a warranty deed conveying the legal title to Fiske, and constituting him their attorney in fact, with power to sell the land at public or private sale at such time as he should deem best, and to make a good and sufficient deed to the purchaser conveying in fee simple. They further contend that they are entitled to have the land sold by the trustee at either public or private sale without foreclosure and the resulting loss and expenses.

The evidence discloses that the deed was executed at a meeting between Mayhew and the representatives of some of his creditors at the office of Mr. Haney, in Lincoln; and, while not expressed in the deed of trust, it was agreed that Mayhew might pay the debts at any time. After the conveyance was made the property was advertised in the Lincoln and Omaha papers by Fiske. An offer was received of \$10,700, which Fiske submitted to Mayhew, but which was rejected by him. Mayhew testifies that, when the deed

was executed, it was not represented to him as a mortgage; that he still claims an interest in the property, and has ever since the deed was signed; that he has paid none of the interest or principal on these debts; that he has taken possession of the land and collected the rents; that the first year he paid the taxes and interest; and that he claims to be entitled to the surplus proceeds of a sale after the debts are paid, and that he had that understanding when he gave the deed.

The question as to the nature of a mortgage and the essential quality of like instruments to that in consideration here came up at an early date in the legal history of this state. In *Kyger v. Ryley*, 2 Neb. 20, the history and character of mortgages at common law and in equity was considered, and it is said: "A mortgage in this state is a mere pledge, or collateral security, for the payment of money, or the doing of some other thing," and must be foreclosed by an action. In *Webb v. Hoselton*, 4 Neb. 308, a deed which conveyed certain real estate to a trustee, and provided that in default of the payment of a promissory note the trustee was empowered to sell the estate at public auction, but that upon full payment of the same with interest a reconveyance should be made, was held to be in effect a mortgage. The court said: "The fact that the mortgage in this instance is in the form of a deed of trust does not change its character from a mere security for the payment of money, nor does it convey the legal title, nor do the restrictions therein contained prevent the plaintiff from availing herself of the safeguards thrown around the debtor to prevent a sacrifice of her property." In *Hurley v. Estes*, 6 Neb. 386, it is said in the syllabus: "(1) A deed of trust is a mortgage, and only differs from a mortgage with a power of sale, in its being executed to a third person instead of a creditor. (2) When an instrument is given as security for the payment of money, or the performance of some collateral act, it is a mortgage whatever may be its form." Judge MAXWELL in the opinion quotes authorities establishing the rule. *Comstock v. Michael*, 17

Neb. 288, and *Staunfield v. Jeutter*, 4 Neb. (Unof.) 847, are to the same effect. This is the general rule. 27 Cyc. 1004, and cases cited in note 7; 3 Devlin, Deeds (2d ed.) sec. 1126.

While in many, or perhaps the majority, of the states a deed of trust with a power of sale may be foreclosed by a strict foreclosure under the power conferred (27 Cyc. 1450), we consider the law settled to the contrary in this state. There is a difference between the instruments involved in the foregoing cases and that under consideration here, in this: that in each of the former the debt was payable at a future day, and there was a condition that in default thereof the deed should become absolute, while in the present case the power confers the immediate right to sell the property. In this respect, however, the instrument is no different in effect from an ordinary mortgage or deed of trust after condition broken. In such case the fact of default does not in anywise alter the legal relation of the parties, and, under the settled rules in this court, an action to foreclose the mortgage is necessary in order to bar the equity of the mortgagor or grantor and other persons claiming under him. *Wheeler v. Sexton*, 34 Fed. 154 (which is a Nebraska case); *Comstock v. Michael*, *supra*; *Hurley v. Estes*, *supra*. This is the view taken by other courts. *Ogden v. Grant*, 36 Ky. 473; *National Bank v. Lovenberg*, 63 Tex. 506; *Cooper v. Brock*, 41 Mich. 488; 27 Cyc. 1004. There is a full discussion of the general subject in 2 Jones, Mortgages (6th ed.) sec. 1764 *et seq.*

It is true that in the instrument it is provided that "this instrument shall not be construed as a mere mortgage," and that the grantors by the instrument constitute Fiske their attorney in fact "to make sale of said premises and deed of conveyance of the same vesting an indefeasible title in the purchaser thereto," but this language cannot control the whole instrument. The decisive facts in the case are that the instrument was intended to convey the land as security for the payment of certain debts, and not to divest the grantor of all his interest in the land. He still retained

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in equity the title to the land. The instrument was intended as a security, under the rule in this state is a mortgage, and must be foreclosed as one.

The judgment of the district court is

AFFIRMED.

HARRY M. HACKETT, APPELLEE, V. ALAMITO SANITARY DAIRY COMPANY, APPELLANT.

FILED NOVEMBER 14, 1911. No. 17,009.

1. **Highways: LAW OF THE ROAD.** Prior to the enactment of section 147, ch. 78, Comp. St. 1911, the rule as to the rights of persons driving in the same direction in a public road or street, and seeking to pass each other, was that ordinarily it is the duty of each driver to keep the proper side of the road, but this is not absolute. He is not bound to keep his side, but if he does not do so he must use more care and keep a better lookout to avoid collision than would be necessary were he on the proper side.
2. ———: ———. In a narrow street, he must not unnecessarily block the way or crowd other travelers to one side, and he must use the highway in such a manner as not unreasonably to deprive other travelers of their equal right to the use of the street.
3. ———: ———: **NEGLIGENCE: QUESTIONS FOR JURY.** These rules, however, are subject to exception. It is impossible to lay down a hard and fast rule applicable to all situations which may arise in the streets of a city, and, even though a deviation from the rule of the road has taken place, the question whether the defendant or his servants have been guilty of negligence, or the plaintiff guilty of contributory negligence, is ordinarily one for the jury.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. Affirmed.

Edgar M. Morsman, Jr., for appellant.

Albert W. Jefferis and F. S. Howell, contra.

LETTON, J.

Seventeenth street in the city of Omaha is 60 feet wide

from curb to curb and is paved with asphalt. During the construction of a building on the west side of the street, a high board fence was built at a distance of 40 feet from the west curb, leaving the street at this point accessible for vehicular traffic only 20 feet wide. On June 21, 1909, a wagon belonging to the defendant, loaded with milk cans, was being driven northward on Seventeenth street between Harney and Farnam streets along this 20-foot roadway. The view of the driver to the sides or backward was unobstructed. Two boys, Harry Hackett, 11 years of age, and George Lemon, 14 years old, mounted upon bicycles, were also passing along this street in the same direction. Defendant's team was proceeding at a slow walk, while the boys were riding at a rate of about 8 miles an hour, the Lemon boy being about 5 feet in front of Hackett. They attempted to pass the wagon on the left side. As they were passing between the wagon and the fence, the horses swerved towards the west approaching to within a few feet of the fence. The Lemon boy passed through between the horses and the fence safely; but, when Hackett reached the front part of the wagon or the rear of the horses, the handlebars of his wheel struck the fence and he fell in such a manner that the front wheel of the wagon ran over his arm and crushed it. There was testimony that Lemon called out to the driver, "Look-out," as he passed the horses' heads, that Hackett also called out as he reached the front wheels, but the driver denies hearing any warning, except from Lemon, until after the boy fell. There is also a conflict in the evidence as to the exact position of the wagon before the team approached the fence, but it was nearer the fence than the curb. This action was brought to recover damages for this injury on account of the negligence and carelessness of the driver. The plaintiff recovered a judgment for \$5,000, and the defendant has appealed.

The principal allegations of negligence in the petition, divested of circumlocution, are as follows: That the defendant's servant, at the time when plaintiff undertook to

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pass its horses and vehicle, negligently suffered the vehicle to be upon part of the 20-foot highway west of the center line thereof, and, as the plaintiff was attempting to pass, negligently caused the horses and vehicle to turn suddenly to the westward toward the immediate path in which plaintiff was traveling, without any warning to the plaintiff, and negligently, carelessly and recklessly drove said team of horses and vehicle so that the same collided with the plaintiff and the bicycle upon which he was riding. It is further charged that there was negligence on the part of the driver, in that, at and before the time of striking the plaintiff, he was not giving his attention to his team, and was not giving his attention to the plaintiff or other travelers who were about to pass the vehicle, when by the exercise of ordinary care he could have discovered the plaintiff and avoided the collision. The answer was a general denial and a plea of contributory negligence.

Defendant contends that the law is that "a person driving along the highway owes no duty to another coming up in the rear, unless he knows that such other person is coming up and desires to pass. If the person in the rear desires to pass to the front, it is his duty to make such desire known to the person in front, and then, if conditions of the road permit, the person in front should pull to one side or the other and give the person in the rear the opportunity to pass. * * * A person traveling on the highway has the absolute right (so far as persons in the rear are concerned) to use any portion of the highway he desires, and this right to use any portion of the highway is not limited because another vehicle comes up in the rear." Defendant's counsel cites a number of cases as supporting these views, most of which we will hereinafter examine. He calls our attention particularly to the case of *Holt v. Cutler*, 185 Mass. 24, where the facts were that a girl riding a bicycle and attempting to pass a wagon ahead of her by going between the wagon and the curb—a distance of five feet—was thrown from the wheel by the wagon swerving toward her, the driver being unaware of her proximity.

The report, however is very meager, and does not indicate whether she tried to pass on the proper side of the wagon, nor whether the street was a narrow one; so it gives no light on the question before us.

The determination of this case requires a consideration of the common law with respect to the rights of one attempting to pass another driving along a road or street in front of him, since at the time of the accident there was no statute in force in this state on this point. The legislature has since acted on this subject by the passage of section 147, ch. 78, Comp. St. 1911, at least with respect to motor vehicles.

The decisions of the various courts are somewhat confusing; some of them being based upon statutes, and others are not in harmony with each other. In England the rule of the road requires persons driving, meeting other vehicles, to keep to the left, and that, in passing, the foremost bears to the left while the other passes on his right; while in the United States and upon the continent of Europe the rule is that persons meeting must keep to the right, and the usual custom is to pass to the left of a vehicle ahead.

In determining the true rule, we will endeavor to discriminate and to confine our examination to cases where accidents have been caused when passing others driving in the same direction. We will first examine the English cases bearing upon the question whether there is any duty to keep on one side of the road, and, if so, how far the obligation extends. In *Wakeman v. Robinson*, 8 Moore (Eng.) 63, the accident was caused by defendant driving an unruly horse between two vehicles on the wrong side of one of them, when the horse plunged and caused an injury to the plaintiff's horses. A judgment for plaintiff in trespass was sustained.

In *Pluckwell v. Wilson*, 5 C. & P. (Eng.) *375, Justice Alderson said: "A person was not bound to keep on the ordinary side of the road; but that, if he did not do so, he was bound to use more care and diligence, and keep a better lookout, that he might avoid any concussion, than

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would be requisite if he would confine himself to his proper side of the road."

Wordsworth v. Willan, 5 Esp. (Eng.) 273: Plaintiff was on horseback on the proper side of the road; defendant's coach drove furiously down the hill which the plaintiff was ascending, and the horse, becoming frightened, became restive and jumped about, when the coach ran against him and broke his thigh. Defendant contended there was ample room left for the horse, and that the accident was caused by defendant's horse's restiveness, and not by neglect of the driver. Plaintiff contended that the carriage should have kept on the proper side of the road, and that even if the restiveness of the horse contributed to the accident the defendant was liable. Mr. Justice Rook said that "he could not lay it down that a carriage driver was under every circumstance to keep exactly to the left, or, as it was called, the proper side of the road; if there was no interruption of any other carriage, or the road was better, public convenience did not require that the driver should adhere to that law of the road; he took the rule of law to be that if a carriage coming in any direction left sufficient room for any other carriage, horse, or passenger, on its side of the way, it was sufficient; but it was a matter of evidence if the defendant had done so. The driver was not to make experiments, he should leave ample room, and, if an accident happened from want of that sufficient room, he was no doubt liable. He, therefore, left it to the jury to say whether the accident had not been occasioned by the defendant's coachman having driven so near to the plaintiff's horse; that the action arose from that cause." But in *Wayde v. Lady Carr*, 2 Dow. & Ry. (Eng.) 255, the facts were that defendant's carriage was on the wrong side of the road, and his coachman tried to pass on the near, instead of the off, side, according to English usage. The court said: "In the crowded streets of a metropolis where this accident happened, situations and circumstances might frequently arise where a deviation from what is called the law of the road would not only be justi-

fiable, but absolutely necessary. The question in this case was a question of negligence. Of this the jury were the best judges, and, independently of the law of the road, it was their province to determine whether the accident arose from the negligence of the defendant's servant." The English courts also hold that the rule as to a carriage being on the proper side of the road does not apply with respect to foot-passengers; for, as regards foot-passengers, a carriage may go on either side. *Cotterell v. Starkey*, 8 C. & P. (Eng.) *691; *Lloyd v. Ogleby*, 5 C. B. n. s. (Eng.) 667.

The rule in America does not seem to be clear and well settled as to the duty of one who is driving a vehicle where others may desire to pass. It may be said that a number of cases based on statutes, and applying to cases of meeting vehicles, have been cited and applied by some writers as establishing a rule where persons were driving in the same direction. This has, no doubt, led to some of the confusion.

Bolton v. Colder, 1 Watts (Pa.) 360, holds that it is not the law that, where carriages are passing in the same direction, the leading carriage should be inclined to the right and the other to the left, but that the law is that "a traveler may use the middle or either side of a public road at his pleasure, and without being bound to turn aside for another traveling in the same direction, provided there be convenient room to pass on the one hand or on the other." The following cases, in the main, hold the same doctrine, but perhaps not all so positively: *Foster v. Goddard*, 40 Me. 64; *Clifford v. Tyman*, 61 N. H. 508; *Elenz v. Conrad*, 123 Ia. 522; *Brennan v. Richardson*, 56 N. Y. Supp. 428; *Altenkirch v. National Biscuit Co.*, 111 N. Y. Supp. 284; *Rand v. Syms*, 162 Mass. 163; *Meservey v. Lockett*, 161 Mass. 332; *Bierbach v. Goodyear Rubber Co.*, 15 Fed. 490. Mr. Thompson (1 Thompson, Negligence, secs. 1289, 1290) seems to be of the opinion that "the 'law of the road' does not apply in the case of teams going in the same direction"—citing *Clifford v. Tyman*, *supra*. He criticises the doctrine of *Bierbach v. Goodyear Rubber Co.*, *supra*, that a

driver is under no obligation to give notice to those behind him when he seeks to turn, and that the rule of reasonable care exacts a greater degree of attention from the driver of the team behind than from the driver that turns out, saying: "More or less doubt attends the foregoing exposition of the law." Mr. Elliott (2 Elliott, Law of Roads and Streets, sec. 1084) says, after stating the doctrine of *Bolton v. Colder*, *supra*, and citing a number of other cases: "The only rule of general application that can be laid down is that he who attempts to pass another going in the same direction must do so in such manner as may be most convenient under the circumstances of the case, and if negligent, and damage results to the person passed, the former must answer for it, unless the latter by his own recklessness or carelessness brought the disaster upon himself. There are, however, statutes in some jurisdictions regulating the mode of passing, especially in regard to automobiles, and it is believed that both under such statutes and in their absence the usual mode under ordinary circumstances is for the traveler in the rear to pass on the left of the vehicle in advance."

In Massachusetts, it was first held that if a person driving left the proper side of the street and interfered with others, he was responsible as a matter of law for the consequences. *Fales v. Dearborn*, 1 Pick. (Mass.) 345. But it was afterwards settled in that state that a person is not negligent, as a matter of law, by driving on the wrong side of the street. *Wood v. Boston Elevated R. Co.*, 188 Mass. 161; *Galbraith v. West End Street R. Co.*, 165 Mass. 572. On the other hand, in *Avegno v. Hart*, 25 La. Ann. 235, 13 Am. Rep. 133, it was held that it was the duty of the driver, seeking to pass another, to go to the left, and it was proper for the leading driver to pull his horse to the right, in order to allow the one attempting to pass him to pass on the left side.

In *Loneragan v. Martin*, 23 N. Y. Supp. 968, the facts were that, while driving along a street behind defendant, plaintiff turned out where there was sufficient room for

the purpose of passing; defendant then, without warning, suddenly turned his horse against the plaintiff's horses, forcing them against an engine which was standing near the curb, then drove ahead, his hind wheel passing over a hoof of plaintiff's horse and injuring him. The trial justice dismissed the complaint, but on appeal to the general term it was held that the questions of negligence and contributory negligence should have been submitted to the jury.

From a consideration of all these cases, it seems that no definite rule as to the respective duties of persons passing or seeking to pass each other with vehicles has been adopted by all courts. We are inclined, however, to adopt the rule, which seems to be based upon sound reasons, that it is ordinarily the duty of each party to keep the proper side of the road, but this is not absolute. He is not bound to keep his side, but, if he does not, he must use more care and keep a better lookout to avoid collision than would be necessary, were he on the proper side. In a narrow street he must not unnecessarily block the way or crowd other travelers to one side, and he must use the highway in such manner as not unreasonably to deprive other travelers of their equal right to the use of the street. *Pigott v. Engle*, 60 Mich. 221. In a busy city it is impossible to lay down a hard and fast rule, and whether negligence existed under the circumstances of the case is ordinarily a question for the jury. The instructions given by the trial court were fully as favorable to the defendant as it was entitled to as to the driver's right to occupy any part of the street, and we find no error in giving them, or in refusing those requested. The proof shows that when the accident happened defendant's wagon was nearer the left side of the very narrow street than the right, that there was nothing to prevent it from being driven farther to the right, and thus leaving plenty of room for other vehicles to pass between it and the fence; that, without any apparent reason, the driver either drove, or allowed the horses to swerve, to the west in such manner as to come close to the

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fence and prevent any person driving or riding behind him from passing on their proper side of the street and of his vehicle. We think it was for the jury to say whether the act was negligent or not, considering all the circumstances.

And so as to the question of contributory negligence, the streets are intended to be used by children as well as adults, and the question of whether, under all the circumstances, the plaintiff at the time he started between the wagon and the fence was justly chargeable with knowledge of the fact that the driver might swing his horses toward the fence, and thus bar a passageway on the proper side, was also a question for the jury. *Footte v. American Product Co.*, 195 Pa. St. 190, 49 L. R. A. 764. The law upon this point was laid down in the instructions as favorably to defendant as it was entitled to.

We find no error in the record of which defendant is entitled to complain, and the judgment of the district court is

AFFIRMED.

BARNES and FAWCETT, J. J., dissenting.

We are unable to give our assent to the conclusion reached by the majority of our associates. As we view the record in this case, the evidence fails to establish negligence on the part of the defendant. It appears that the driver of defendant's team was proceeding north on Twentieth street in the city of Omaha at the time of the accident in a reasonable and proper manner; that he had no knowledge of the presence of the injured boy in the rear of his wagon, or that the boy was attempting to pass between the wagon and the fence, until he was opposite the front wheels of the wagon; that when the driver first saw the boy it was then too late for him to avoid the accident, and the proximate cause of the injury complained of was the attempt of the boy to pass between the defendant's wagon and the fence, when there was ample room to pass in safety on the other side of the wagon. We are therefore of opinion that the evidence does not support the verdict, and the judgment of the district court should be reversed.

COOPER & COLE BROTHERS, APPELLEE, v. GILBERT COOPER
ET AL., APPELLEES; GEORGE P. WHITHAM, APPELLANT.

FILED NOVEMBER 14, 1911. No. 16,295.

1. **Parties.** Persons not jointly liable to the plaintiff, or who do not claim some right in the subject matter of the action, may not, over their objections, lawfully be joined as defendants.
2. **Principal and Agent: AUTHORITY OF AGENT.** "The apparent authority of an agent which will bind his principal is such authority as the agent appears to have by reason of the actual authority which he has." *Creighton v. Finlayson*, 46 Neb. 457.
3. ———: ———. "Ostensible authority to act as agent may be conferred if the party to be charged as principal affirmatively or intentionally, or by lack of ordinary care, causes or allows third persons to trust and act upon such apparent agency." *Thomson v. Shelton*, 49 Neb. 644.
4. ———: ———. Where a wholesale dealer in plumbing supplies, furnaces and water plants knows that one of its salesmen has, upon a promise of compensation to be paid, solicited retail merchants in another city to secure customers for it, and, in response to a letter from them to the effect that the time is ripe to get hold of some business and to send a salesman, sends an employee who assumes in its name to make contracts with householders for the installation of heating plants and water plants, and agrees for his principal to pay the local merchants for material furnished and money advanced while the plants are being installed and to pay a commission, and before the work is completed the wholesale merchant is told the facts about the contracts, and it makes no objection thereto, but sends mechanics to install the plumbing and furnaces, and avails itself of the services rendered and money furnished by the retail merchants, it will be held to have at least granted the agent ostensible authority to make the contracts.
5. **Trover: TRANSACTIONS WITH AGENTS.** In such a case the principal cannot maintain an action in conversion against the householders or the retail merchants.
6. **Principal and Agent: UNAUTHORIZED ACTS OF AGENTS: LIABILITY.** If, as a matter of fact, the agent was not authorized to make the contracts, and, because of his assumption of power to do so, his principal is damaged, he will be liable in damages to it.
7. ———: **ACTION: PARTIES.** But the purchasers and the retail merchants cannot, over their objections, be sued jointly with the agent because of the transactions.

APPEAL from the district court for Lancaster county: WILLARD E. STEWART, JUDGE. *Affirmed in part and reversed in part.*

Charles H. Epperson, George E. Hager and Ambrose C. Epperson, for appellant.

Walter J. Lamb and F. M. Tyrrell, contra.

ROOT, J.

This is an action in equity to hold the defendant Whitham, as surviving member of the firm of Whitham & Wilkins, and the defendant Gilbert Cooper liable as trustees for the use of the plaintiff. The plaintiff prevailed, and the defendant Whitham appeals.

The first chapter of the litigation between the plaintiff and the defendant Whitham is reported in *Cooper & Cole Bros. v. Whitham*, 81 Neb. 511. Reference is made to that case for many of the facts testified to in this one. Subsequent to the judgment of affirmance in the cited case, the plaintiff commenced this action.

In the petition the plaintiff alleges that during the period of time involved in this inquiry Gilbert Cooper was its traveling salesman, with no power or authority other than to take and forward orders for the goods and wares in which the plaintiff dealt, and that Whitham & Wilkins had actual knowledge of this fact. The plaintiff further alleges that, notwithstanding the premises, Whitham & Wilkins for their own profit, by deceitfully causing Gilbert Cooper to believe they were purchasing goods from the plaintiff, induced him to join with them in ordering merchandise and plumbing supplies for water systems to complete certain contracts with four designated individuals, all of whom are impleaded as defendants in this action. The plaintiff further says that, pursuant to the orders transmitted by the defendants, it shipped to Whitham & Wilkins merchandise of the aggregate value of \$1,745.11, which was duly charged to Whitham & Wilkins on the

plaintiff's books, and which was fully described in invoices sent to those defendants and in monthly statements transmitted to them; that those invoices, bills and statements were kept without objections by Whitham & Wilkins, and frequent promises were made by them to pay therefor; that, although Gilbert Cooper and Whitham & Wilkins knew that the plaintiff at all times believed and understood that the merchandise was sold to Whitham & Wilkins, it afterwards appeared that no such sale had been made, but the goods were actually used in part execution of unauthorized contracts made by Gilbert Cooper for the plaintiff with the defendants MacCashland, Fowler, Kissinger and Lewis, wherein the plaintiff apparently agreed to furnish material and install certain heating plants and air pressure systems for definite sums pleaded in the petition, and the defendant Whitham & Wilkins were to guarantee to the purchasers that the material and work would be first class, were to employ laborers, pay freight on materials shipped, superintend the work, collect the contract price, and remit the same to plaintiff less money paid out and compensation for services rendered, but the contracts were utterly void; that the defendants, other than Cooper and Whitham & Wilkins, were contending that the contracts were not performed, and therefore they were not liable for the contract price; that Whitham & Wilkins have remitted to the plaintiff \$862.47, which the plaintiff, in ignorance of the facts, credited upon its book account against those defendants; that, by reason of the premises, all of the defendants became trustees of the plaintiff for the goods delivered. An accounting and judgment are demanded.

The defendants, other than Gilbert Cooper, having been summoned, and all of them residing without Lancaster county, by special appearance challenged the jurisdiction of the court over their persons, because of the alleged fact that there is no joint liability in point of fact of Gilbert Cooper and the objecting defendants to the plaintiff. These objections were overruled, and thereupon those de-

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defendants demurred, averring as grounds of demurrer, among other things, that the petition did not state a cause of action, that there was a misjoinder of parties defendant and of causes of action. The demurrers were overruled, and thereupon those defendants answered separately. We find nothing in the transcript to advise us whether Gilbert Cooper answered or made default.

The answering defendants interposed in their several answers the defenses included in the special appearances in the demurrers, and also stated the facts from their standpoint, to wit: That the contracts were made in good faith with the plaintiff, and that Gilbert Cooper had actual or apparent authority to make them, and, in any event, the plaintiff with knowledge of the facts neglected to disaffirm what its agent had done, but continued to perform, and is estopped from repudiating the contract. All of the defendants deny the allegation that they knew of Gilbert Cooper's lack of authority, and Whitham & Wilkins plead the facts as stated in *Cooper & Cole Bros. v. Whitham, supra*. The court found generally in favor of the plaintiff, except that nothing was due it from Kissinger or Lewis, and the action was dismissed as to them. Several judgments for \$110.33 and \$63.73, respectively, were rendered against the defendants MacCashland and Fowler, and a joint judgment for \$1,042 was entered against Whitham, surviving partner, etc., and Gilbert Cooper, with a proviso that the avails of the judgment against MacCashland and Fowler, if collected, should be credited on the judgment against Whitham and Cooper. Cooper, Fowler and MacCashland did not appeal.

We have discovered no evidence in the record to sustain the averments in the petition that any of the defendants, other than Gilbert Cooper, had actual knowledge of the pleaded restrictions on his authority, or that Whitham & Wilkins in any manner deceived Gilbert Cooper, or that they joined with him in ordering any of the merchandise the subject of this suit. The answering defendants must therefore in the inception of the transaction be held bound

solely by such notice as the law from the known facts gave them of Gilbert Cooper's authority.

We have no quarrel with the argument of the plaintiff's counsel that, as a general proposition, a drummer is not authorized to appoint agents or enter into special contracts, but this proposition has so many exceptions and qualifications, depending upon the usages of the trade and the facts in the particular case, it is not necessarily controlling in the instant one in arriving at a just conclusion as to the legal rights of the parties to this suit. It appears without contradiction that the plaintiff's salesman, Williams, after making an independent investigation in Fairfield, requested Whitham & Wilkins to assist the plaintiff in a campaign to be prosecuted for the purpose of securing contracts for the installation of heating plants and water plants in that city, told them that they might as well make something out of that work as not, that the plaintiff employed a man whose special duty it was to go about and make contracts for such work, and requested them to advise the plaintiff whenever opportunity occurred to secure such contracts. There is no contention that Williams was not acting in the line of his duty, but, on the contrary, the evidence proves that he was acting within the scope of his employment. It therefore must be presumed that this agent advised his principal, the plaintiff, of his conversation with Whitham & Wilkins.

May 20, 1905, subsequent to this conversation, Whitham & Wilkins wrote and transmitted to the plaintiff a letter as follows: "The time is about ripe to get hold of some business in bath outfits. We have a number of good prospects. Have your salesman G. G. W. make it a point to get around here soon." In answer to this letter, Gilbert Cooper appeared in Fairfield, and informed Whitham & Wilkins that "he had been sent there by the house;" and the contracts pleaded in the petition were made by him in the name of the plaintiff. Thereupon material was billed to Whitham & Wilkins, and the work of installing the water plants and the heating plants was commenced.

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Although Gilbert Cooper was in Fairfield several times while the work was progressing, Whitham & Wilkins superintended the work. About August 17, 1905, Whitham complained to the plaintiff's Mr. Williams about delays in the work, told him the details of the contracts, and requested him to take the matter up with the plaintiff. Upon Williams' suggestion that he would deliver a letter if it were written, Whitham & Wilkins wrote as follows: "Cooper & Cole Bros., Lincoln, Neb. Gentlemen: Mr. Williams called on us this evening. We are not in position to do any business with him. Mr. Gilbert Cooper has a lot of work here uncompleted. It is in a mixed shape. One pressure job working, but lacks some finishing details. Another pressure job has been hanging fire for a long time, and a hot water heating job for the same man has not been begun, material has been sent here partly for one job and partly for another on same invoices. We are unable to tell how matters stand until these jobs are completed and material checked up. We are ready to make settlement when matters are straightened out. We have lost some business on account of these delays. The steam heating contract on our public school building is liable to hinge somewhat on the satisfactory completion of the work in progress. The estimate on the above job is about \$1,800. Yours truly, Whitham & Wilkins. As appears to us now the material is far in excess of Mr. Cooper's figures and will mean a loss to some one on these contracts. Who is to stand the loss?"

To this communication the plaintiff answered as follows: "Aug. 23, '05. Messrs. Whitham & Wilkins, Fairfield, Neb. Gentlemen: Mr. Williams sent us in your letter of the 17th, and we note what you say regarding the material which had been sent out on the work at Fairfield and sending out a man to do this work. This is a personal matter of Mr. Gilbert Cooper's as the house has no men in their employ who can do the work; but we wish to say that he has used his best endeavors to try to get a good man for you to finish up the work. It seems all men who are

employed to do this kind of work have more than they can do. He has a party working at Fairmont who will probably be able to go out there after he finishes the work there. One of our local plumbers thinks he can find a man during the day that can do the work. We are very sorry that it has caused you a lot of trouble, and the loss of some business. We will make an effort to get somebody to go out there and finish the work as soon as possible. Yours truly, Cooper & Cole Bros."

It will be noticed that the plaintiff does not discuss Gilbert Cooper's estimates, nor answer the inquiry concerning upon whom the anticipated loss will fall. The proof is undisputed that Gilbert Cooper contracted with other individuals at other places in the name of the firm for the installation of heating and water plants. In so far as the evidence establishes usage in the trade, it clearly indicates that the plaintiff did permit its traveling salesmen to make contracts such as Gilbert Cooper made in their name. Furthermore, at least three of the defendants with whom Cooper contracted came to Lincoln while the work was in progress, and complained to the plaintiff's general manager about the work, and at least one of them testifies that he told the manager about the contract, and all of them testify to having received assurances that, if they would be patient, the work would be completed to their satisfaction, and that the manager complained about Gilbert Cooper having exceeded his authority. At least two-thirds of the material was shipped subsequent to the time Williams delivered to the plaintiff Whitham & Wilkins' letter of August 17. It is elementary law that, if the real owner of goods has so acted as to clothe his agent with apparent authority to sell, he will be precluded from denying, as against those who have acted *bona fide* on the faith of that apparent authority, that he has given such authority, and the result of the transaction is as if the authority had been given. 1 Clark & Skyle, Agency, sec. 236; Mechem, Agency, sec. 278.

This case does not, as contended for by the plaintiff, involve a sale by a mere drummer. After having been informed by Williams, as we must presume, that he had enlisted Whitham & Wilkins to assist in procuring business in Fairfield, and after Whitham & Wilkins had written the letter, Gilbert Cooper was sent for the specific purpose of selling the plaintiff's merchandise to the persons referred to in a general way in that letter. From all that had been said and done by Williams and by Whitham & Wilkins, MacCashland and the other purchasers had a right to believe that Gilbert Cooper had authority to make the contracts, and Whitham & Wilkins also had a right to believe that Gilbert Cooper was acting within the limitation of his authority in doing what he did. *Faulkner v. Simms*, 68 Neb. 295; *Northwest Thresher Co. v. Eddyville State Bank*, 80 Neb. 377.

This being true, Whitham & Wilkins may be liable to the plaintiff upon the contract, but not for a conversion of its goods. Gilbert Cooper may also be liable to his principal for all the damages it may have sustained by reason of his acts in excess of his authority. If liable, the liability of each of these defendants is several, and they cannot, over their objections, be jointly sued therefor. Gilbert Cooper has not appealed and makes no complaint, so that the judgment will not be disturbed as to him. Neither will it be reversed as to the defendants Lewis and MacCashland, who have not appealed. The fact that Whitham was not jointly liable with Gilbert Cooper, or that he made no claim of right to the subject matter of the action, did not appear on the face of the petition, so that the defense was properly made, by answer, as a separate defense in connection with a defense to the merits. The defense having been maintained, the action should be dismissed as to this defendant, but without prejudice to an action on the contract made by Gilbert Cooper for his principal. *Stewart v. Rosengren*, 66 Neb. 445; *Penney v. Bryant*, 70 Neb. 127; *Stull Bros. v. Powell*, 70 Neb. 152.

Johnson v. Riseberg.

The judgment of the district court, therefore, is affirmed as to the defendants Cooper, MacCashland, and Fowler, but is reversed and dismissed as to the defendant Whitham without prejudice to an action upon the contract made for the plaintiff by Gilbert Cooper; no costs to be taxed to the defendants MacCashland and Fowler.

JUDGMENT ACCORDINGLY.

HELMER JOHNSON, APPELLEE, v. MATHILDA RISEBERG ET AL.,
APPELLANTS.

FILED NOVEMBER 14, 1911. No. 16,816.

1. **Specific Performance: AGREEMENT TO DEVISE: EVIDENCE.** Clear, direct and uncontradicted testimony given by a disinterested witness that a woman, having no lineal descendants, orally promised her stepson that if he would remain on her farm, live in her house during her natural life, and treat her as a son should treat his mother, he should have the farm at her death, corroborated by the evidence of disinterested witnesses concerning her declaration to the effect that her stepson had an interest in the farm and would have it after her death, if believed by the court, will sustain a finding that the contract was made.
2. **Statute of Frauds: PART PERFORMANCE.** Acts of performance relied on to remove the bar of the statute of frauds to an oral contract to transfer the title to real estate must be unequivocal, and of such a nature that, if stated, an inference will reasonably arise that an agreement of some nature existed between the parties with reference to the real estate.
3. **Specific Performance: REMEDIES.** If the acts of performance relate to service of such character that their value cannot be estimated by a pecuniary standard, the claimant does not have an adequate remedy in pressing a demand for a money judgment for a breach of the contract.

APPEAL from the district court for Boone county:
JAMES N. PAUL, JUDGE. *Affirmed.*

F. D. Williams, H. C. Vail and J. H. Leahy, for appellants.

C. E. Spear, F. J. Mack and Albert & Wagner, contra.

Root, J.

This is an action for specific performance of an alleged oral contract for the transfer of title to a farm in Boone county. The plaintiff prevailed, and the defendants appeal.

As we understand the argument of defendants' counsel, their contention is that the evidence is insufficient to establish a contract, or one which may not be satisfied by the payment of money, or to prove such performance as will remove the bar of the statute of frauds. There is no contention in the answer or in the arguments that an oral contract to sell or convey this real estate might not be enforced under some circumstances, so we shall approach the case in the attitude assumed by counsel for both sides.

There is no evidence directly contradicting that adduced to prove the statements made by Mrs. Johnson and relied on to establish the contract, and but little proof to discredit by inference the evidence that those statements were made, nor is there any conflict in the evidence concerning the acts of performance. The plaintiff's mother died after his birth in 1875; in 1881 his father, after marrying Gustafva Bergstrom, entered as a federal homestead the land in dispute, but subsequently, within four years, departed this life, leaving the plaintiff, two other children and his widow him surviving. She subsequently availed herself of the federal statute, and in 1889 secured a patent for the land in controversy. There are no children the issue of the second marriage, nor did Mrs. Johnson have any lineal descendants.

In 1885 or 1886 the widow sent a letter to a married sister residing in Chicago to induce her to come to

Nebraska and live with Mrs. Johnson, but the request was denied. Thereupon Mrs. Johnson, in substance, said to the plaintiff and his brother that, since her relatives would not help them, they must help themselves; that the boys needed assistance at the time, and later she would need help; that if they would stay with her and treat her like a mother she would treat them as her sons, and whatever property she had they "will get when I leave." The boys remained with her, improving and cultivating the farm and caring for her while she cared for them, until Richard, the elder, was about to marry in 1897. At this time the plaintiff was 22 years of age, and Richard three years older. The plaintiff and Richard intended to leave the farm, but when Mrs. Johnson was informed of that intention she stated, in substance, to her stepsons that she did not care about Richard leaving, but that she wanted the plaintiff to remain, look after the farm, and treat her as a mother, and if he would do so she would treat him as a son, "and whatever I have at the time of my death you are going to get it." Thereupon the plaintiff abandoned his purpose to leave, and remained with his stepmother until her death in 1909. The plaintiff has remained unmarried, and the evidence is uncontradicted that, although Mrs. Johnson was an irritable scold, he treated her with kindness and respect.

In corroboration of the direct and certain testimony of Richard Johnson concerning the promise, the plaintiff offered his neighbors' testimony relative to her declarations, many of which may be considered testamentary in character, yet some of them indicating her understanding that Helmer had a present interest in the land. In substance, she said to Mrs. Hildebrand that she wanted Helmer to have her property; to Mr. Nelson, about a year before her death, she said, in response to his solicitation that she purchase lightning rods for the buildings on the farm, that she did not believe in them, "but Helmer could put them up if he wanted to, that it would be his place anyway after she died;" to Mr. Postle, an insurance

agent, she said in 1898, in answer to his inquiry concerning whom the loss should be payable to if the property insured should be destroyed by fire: "The property is in my name, but as soon as I get through with it it will go to Helmer." She said "Helmer was caring for her, and living with her, and when she died the property would go to him because he was taking care of it. * * * She says, 'The property is mine, but it is Helmer's when I die.'" To Milford Nelson, Mrs. Johnson said, about a month before her decease: "When she was done with her property, it would belong to Helmer." There is also proof of her declarations made shortly before her death to the effect that she intended to give the farm to her relatives, and that Helmer had been paid for everything he had done for her. It will be noticed that the statements were made to Postle the year the contract was made, and recognize most clearly his interest in the land, and that the declarations evidencing testamentary intent, rather than an admission of his absolute right, were made many years thereafter.

Parents, or those sustaining the relation of parents, not infrequently regard contracts with their children less seriously than if made with third persons, and it is not unnatural that Mrs. Johnson, as the farm increased many fold in value, and her stepson by industry and frugality acquired other valuable real estate, considered that he had enough of this world's goods, and that the thought should come to her that her relatives by consanguinity should receive some benefit from her hands. The fact that Mrs. Johnson had no lineal descendants and that her collateral kindred refused to come to her assistance at the time her husband died, and that so recent as 1897 the land was not worth to exceed \$1,600, tends to prove that the promise was natural and reasonable.

The evidence to sustain the plaintiff's allegations that the contract was made is as certain and convincing as was the evidence adduced in *Peterson v. Bauer*, 83 Neb. 405, in *Hespin v. Wendeln*, 85 Neb. 172, or in *Cobb v.*

Macfarland, 87 Neb. 408. It is argued, however, that a letter written by the plaintiff to Mrs. Riseberg a few days after Mrs. Johnson's death is an admission that he had no contract with his stepmother. In that communication the plaintiff in effect states that, since the deceased left no will, her relatives were her heirs; that, by the time his claim for caring for her shall have been satisfied, there will be little left of the estate, and that he will pay them each \$3.50 for their interests therein. The plaintiff explains that he understood when the letter was written that, since there was no written evidence of the contract, he could not enforce it, but must depend on a money demand against the dead woman's estate to recompense him for his performance of the oral contract. If this case depended upon the plaintiff's evidence for its support, the defendants' argument would be persuasive; but the proof to establish the promise is furnished by other and disinterested witnesses, upon whose statements this letter reflects little, if any, discredit. The plaintiff's explanation is reasonable and in accordance with the common experience of men.

It is further argued that the acts of performance are not solely referable to the contract, and hence are insufficient to take it without the statute of frauds. No attempt was made during the trial to compel the plaintiff to marshal his evidence so as to first prove performance, so that the district judge considered all of the evidence to satisfy himself whether there was proof of an act unequivocally referring to and resulting from the agreement. The act need not necessarily refer to the terms of the contract, but, as stated by the Master of the Rolls in *Frame v. Dawson*, 14 Ves. Jr. (Eng.) 385: "The principle of the cases is that the act must be of such a nature that, if stated, it would of itself infer the existence of some agreement; and then parol evidence is admitted to show what the agreement is." While the evidence of performance is not so definite as we should prefer, yet we think that the proof that, when Richard departed from

his stepmother's premises, Helmer, then only a year past his majority, remained and continued unmarried to reside with his stepmother, caring for her in sickness and in health notwithstanding her nagging and ill temper, establishes the existence of facts which we may in reason refer to something more than the relation of stepmother and stepson, or of landlady and tenant, and that an inference fairly arises that this childless woman had made some arrangements with her stepson whereby he acquired an interest in her estate.

Upon the entire record, there is proof of the contract and of such performance as to remove the bar of the statute of frauds. We do not think a money judgment will compensate the plaintiff for a breach of his contract. We cannot well measure by any pecuniary standard the value of his services, nor the value of the privileges and opportunities he renounced in the faith that his stepmother would convey or devise to him the farm in question.

Some questions of practice are argued, but they are immaterial for a consideration of the case on its merits, and in nowise prejudiced the defendants.

The judgment of the district court is therefore

AFFIRMED.

REESE, C. J., dissenting.

While it is true that the homestead was taken by plaintiff's father in the first instance, and by reason of his death the patent was issued to his widow, and that the farm was improved by the joint labors of the decedent and her stepsons—probably largely by those of the stepsons—yet the title was in the widow, and it was her right to make such disposition of the land as she might desire, or none at all. She had the right to make a contract, upon sufficient consideration, to convey it to plaintiff, if she so desired. However, it strikes me that no such contract was ever made. After making the declaration attributed to her, that whatever she had at the time of

her death plaintiff was going to get, plaintiff continued to reside on the farm as a renter, taking two-thirds of the products, the widow, his stepmother, reserving one-third, and providing him a home as a member of the family, as she had done during practically his whole life. So far as is shown, this relation between them continued until the time of her death. I can find no promise ever made on her part to convey the land to plaintiff, either by will or deed. I can find no evidence that plaintiff ever relied on a supposed or believed promise. I think the most that can be said is that the decedent expressed a desire and willingness that after her decease plaintiff should have the land, but she took no steps to render such purpose effective. I do not believe that such desire or willingness was based upon any legal or binding contract. I do not base this dissent upon the provisions of the statute of frauds, but upon my belief that no contract was proved, nor was there any consideration therefor, had one been proved. I need not refer to our uniform holdings, in line with all authorities, that in an action for specific performance the proof of the contract must be clear and convincing, as that is the settled law.

LETTON, J., concurs in this dissent.

NATIONAL BANK OF NORTH BEND ET AL., APPELLEES, v.
LEWIS THOMPSON, APPELLANT.

FILED NOVEMBER 14, 1911. No. 16,929.

1. **Usury:** NOTES: ATTORNEY'S FEE. A provision in a promissory note, executed subsequent to June 1, 1879, that the maker will pay the plaintiff an attorney's fee if suit be instituted upon the note, is invalid and will not render the instrument usurious.
2. ———: ———: SEPARATE NOTES FOR INTEREST. Separate notes, executed for past due interest upon a promissory note, will not taint the original contract with usury.

APPEAL from the district court for Morrill county:
HANSON M. GRIMES, JUDGE. *Affirmed.*

Williams & Williams and G. J. Hunt, for appellant.

O. E. Abbott and William Morrow, contra.

ROOT, J.

The plaintiffs joined in an action to foreclose the defendant's interest in, and to sell, a tract of land, and for a deficiency judgment in favor of each plaintiff. The plaintiffs prevailed, and the defendant appeals.

The first proposition, that the notes evidencing the debts are usurious because of a promise to pay an attorney's fee, is not well taken. The notes were made in 1907. The provisions are invalid. No attempt was made to enforce them. *Weyrich v. Hobelman*, 14 Neb. 432; *Security Co. v. Eyer*, 36 Neb. 507.

The second contention, that the note given to the Schuyler National Bank is usurious for the further reason that when the debt matured a second note was given for the same amount as the first one, and two notes for \$40 each were executed to evidence the accrued interest, is also not well taken. The court computed simple interest at the rate of 8 per cent. per annum on the original debt. By no correct method of computation or method or reasoning can it be deduced that either note is tainted with usury.

There is no merit in the appeal, and the judgment of the district court is

AFFIRMED.

FIRST NATIONAL BANK, APPELLEE, v. EXCHANGE BANK OF
ONG, APPELLANT.

FILED NOVEMBER 14, 1911. No. 16,970.

Corporations: LIABILITY FOR ACTS OF AGENTS. Where a corporation accepts and retains the fruits of a transaction induced by the fraudulent representations of its agent, made by him while acting within the scope of his authority, it is liable to the party injured thereby.

APPEAL from the district court for Clay county:
LESLIE G. HURD, JUDGE. *Affirmed.*

S. W. Christy, L. E. Cottle, Samuel Rinaker and A. H. Kidd, for appellant.

A. C. Epperson and Culver, Phillip & Spencer, contra.

ROOT, J.

This is an action to recover the purchase price of a negotiable promissory note bought by the plaintiff from the defendant in reliance upon alleged false and fraudulent representations made by its cashier. The plaintiff prevailed, and the defendant appeals.

The plaintiff, a national bank, maintains its principal place of business at St. Joseph, Missouri, and the defendant, a state bank, maintains its principal place of business at Ong, Nebraska. In September, 1908, the plaintiff was one of the defendant's correspondents. During the times hereinafter mentioned, Messrs. J. O. Walker, J. A. Walker, M. Bolton and R. Tweed were the defendant's directors. J. O. Walker was the son of J. A. Walker, and was the cashier and general manager of the bank; J. A. Walker was the president of the corporation. Neither Bolton nor Tweed resided in Ong.

Engene McCann, hereinafter referred to as McCann, was a grain dealer in the village of Western. The deposition of Mr. McCann was introduced in evidence, but he, as well as the Walkers, departed this life before this case

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was tried. The Walkers' depositions were not taken. In 1908 McCann, to the knowledge of J. O. Walker, was insolvent, and had been for years previously. In March, 1908, the defendant's directors instructed J. O. Walker not to permit McCann to overdraw his account, and to "wipe out his overdraft on the book." The amount of this overdraft does not appear in the evidence. At a subsequent meeting of the directors in August, like instructions were repeated to the cashier. September 1, 1908, the president and cashier interviewed McCann at Western, and urged him to borrow money from whomsoever he could, so as to pay the bank and yet continue business, and he was requested to give his note to take up his overdraft. It is not clear whether a note was given at that time, but four days later, September 5, 1908, McCann received a letter written upon one of the defendant's letter-heads, signed "J. O. Walker, Cashier," inclosing a note for \$7,500, payable to J. O. Walker, with a request that he sign and return it. The note was signed by McCann and by his wife and returned to the cashier. According to the defendant's books, McCann's account, on August 22, was overdrawn \$5,170.82; by September 1 the overdraft was reduced to \$1,270.82, and the overdraft was further reduced to \$500.82 by the 7th of the month. September 9 and 10 the account was credited \$1,250, and charged \$6,000, leaving an overdraft of \$5,250.82; \$2,000 at least of this \$6,000 represented McCann's checks presented to the defendant for payment, in the absence of J. O. Walker, and protested by the assistant cashier. McCann's pass-book is credited with his note September 9, 1908, but the defendant's books show no credits on that account until September 11, on which day McCann was credited \$7,500, and the plaintiff charged the same amount. The note, however, was not offered to the plaintiff until the 19th of September, on which day it was received in a letter dated September 18, 1908, which is as follows: "The Exchange Bank of Ong, Capital, \$25,000. Surplus and profits, \$50,000. Ong,

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Neb., Sept. 18th, 1908. First National Bank, St. Joseph, Mo. Gentlemen: I have had some quite large land deals on hand recently; and I will be required to need some money, and I enclose you a note that I hold well secured, that I have guaranteed payment thereon bearing date September 5th, 1908, and due January 1st, 1909, this is A1 paper, and I think that my indorsement on same will make it secure, if you can handle this note for me, you can credit the Exchange Bank of Ong, Nebr., for my use. Most of these land deals will be closed up by the middle of Dec. and the note will be taken up by the time same matures. Please let me hear from you in regard to this matter. Would like to attend your tournament, & will if business will permit me to be absent for a few days. We are very busy, at present. Hoping that you can grant this request, I am, Yours truly, J. O. Walker, Cashier."

The plaintiff purchased the note, and gave the defendant credit for \$7,500, which was subsequently withdrawn by drafts drawn by the defendant on the plaintiff in the usual course of business. The evidence fairly establishes the fact that J. O. Walker, in September, 1908, although possessed of considerable property, was insolvent, and the McCanns were entirely so. Subsequent to J. O. Walker's death, the plaintiff discovered that the note was of but little value, and after an investigation offered to return it to the defendant, and requested the repayment of the \$7,500, with interest.

The defendant, among other things, contends that the transaction was between J. O. Walker, on his personal account, and the plaintiff; that he had no authority to purchase or negotiate the note for it, nor any authority to make false representations to the plaintiff; that it is not a party to the instrument, and cannot be held liable thereon, and that no false representations were made by Walker. Without specific reference to the evidence, we are content to say that the proof is clear that the note was not A1 or well secured, and that, had the plaintiff known the truth concerning the financial condition of the

McCanns and of J. O. Walker, it would not have purchased the paper.

This is not an action upon the note, and therefore the cases cited to sustain the argument that one not a party to a negotiable instrument cannot be sued thereon are not in point. While the right to recover is predicated upon the cashier's alleged fraud, the action is to recover back the consideration paid, and is in the nature of an action for money had and received.

The evidence, as we understand it, is uncontradicted that the defendant owned the note before it was transmitted to St. Joseph. It was made and delivered in response to the request of both the president and the cashier that McCann give a note to take up his overdraft, and McCann testifies that, while it was his custom at times to execute notes payable to J. O. Walker, the bills were uniformly for the benefit of the defendant bank, and that the note involved in this inquiry was given to the payee for the bank. Negotiable notes are used as money, and the particular note was credited to McCann's account on the defendant's books before it was negotiated. It is true that on September 5, McCann's overdraft was but \$500, but there is no proof that he knew that fact; his checks and drafts upon the bank had been issued and were outstanding for a much greater sum; in fact, the assistant cashier testifies that while the Walkers were in Western he protested two of McCann's checks for \$1,000 each. McCann's pass-book shows a credit of \$7,500 September 9, but he says that he was entitled to credit on a much earlier day. The credit was not given on the defendant's ledger until September 11, on which day it was charged to the plaintiff's account. The note was not entered on the defendant's discount register, but it was accepted by the cashier in payment for McCann's debt to the bank, and as a basis for credit which was subsequently exhausted by checks drawn in the usual course of business. McCann was not credited with the proceeds of the sale of this note, but with the note itself. We are

of opinion that the evidence sustains the district court in its finding that the note, when negotiated, was the defendant's property.

This brings us to the defendant's argument that it did not authorize J. O. Walker to make any false representations, and that it should not be held liable for what he wrote. It is true that the cashier's office did not carry with it authority for its occupant to make fraudulent representations, and that the defendant did not authorize him to make them; but, if those representations were made while he was acting for his principal and for its benefit, it cannot escape responsibility while retaining the fruits of his unlawful conduct. *Mackay v. Colonial Bank*, 22 Weekly Rep. (Eng.) 473; *Nevada Bank v. Portland Nat. Bank*, 59 Fed. 338; *Merchants Bank v. State Bank*, 10 Wall. (U. S.) 604, 645; *Fairchild v. McMahon*, 139 N. Y. 290. So it seems to us the inquiry is not so much into the authority vested by law and the by-laws of the defendant in, or the instructions of its directors to, J. O. Walker, as it is concerning for whom he acted when he wrote the letter of September 18 to the plaintiff; whether the plaintiff had a right to and did rely on the statements therein contained; whether they were false; and whether the defendant received and retains the fruits of that transaction. All of these issues were by the district court found against the defendant, and the record amply sustains its action. The defendant's liability follows as an inevitable conclusion of law. What has been said renders unnecessary a discussion of the other points argued in the briefs and at the bar.

The judgment of the district court, therefore, is

AFFIRMED.

SEDEWICK, J., dissenting.

1. When Walker took this note, as between himself and the Bank of Ong, the note clearly belonged to Walker, and not to the Bank of Ong. He had been instructed by the directors to take McCann's note for the balance he

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owed the bank. McCann owed the bank only \$500. Contrary to those instructions, and without the knowledge or consent of the bank, Walker took McCann's note for 15 times that amount, and gave McCann an additional credit for the full amount. This was in violation of the direct and positive instructions of the bank. He never had authority to take a note from McCann for anything more than McCann owed the bank upon the books. His action in giving McCann credit for the amount of the note for his own purposes, and without the knowledge or consent of any of the directors, would not change the right of the thing as between him and the Bank of Ong. Walker was named as payee in the note in his personal, individual capacity, and not as cashier. As the payee in the note, his unrestricted indorsement was on the back. Therefore the form of the contract, as well as the conduct of Walker, would enable the Bank of Ong to insist that as between Walker and the bank, the note was the property of Walker, and not of the bank. His letter transmitting the note for sale declares himself to be the owner of the note, and would certainly estop him to deny that fact in any controversy between himself and the Bank of Ong. Certainly, if the controversy was between Walker and the Bank of Ong, the note belonged to Walker, and he cannot claim that it belonged to the Bank of Ong.

2. The question in this case, therefore, is whether the St. Joseph bank had notice of the real ownership of the note, or whether that bank had just grounds to believe, and did believe, that the note was the property of the Ong bank, and that when it was negotiating with Walker it was negotiating with the Bank of Ong. Without doubt, the decision of this case depends upon that question. The reasons for saying that the St. Joseph bank understood that it was dealing with the Ong bank, and not with Walker personally, appear to be two: First, that the letter transferring the note was written upon the stationery of the bank; second, that the letter was signed "J. O. Walker, Cashier." I think it will not be considered that

the fact that the letter was written on the stationery of the bank is entitled to very much consideration. Walker undoubtedly did use the stationery of the bank in transacting his personal and individual business. Everybody would expect that. Is the fact that the letter was signed "J. O. Walker, Cashier" sufficient to justify the bank in concluding that it was dealing with the Ong bank, and in concluding that the note was the property of the bank, and not the property of Walker? If we remember that the payee named in the note was J. O. Walker, and that it was indorsed "J. O. Walker," and nothing on the note indicated that anyone else was interested in it, and then read the letter in which the note was transmitted to the St. Joseph bank, it would seem that there is no difficulty in determining whether the St. Joseph bank supposed that the note belonged to the Ong bank, or supposed that it belonged to Walker, and that they were dealing with Walker personally. The letter seems to me to be as plain and positive notification that the note did not belong to the bank, and was the property of Walker personally as our language could make it. The pivotal sentence in the letter is, "If you can handle this note for me (J. O. Walker), you can credit the Exchange Bank of Ong, Nebr., for my (J. O. Walker's) use;" that is, if you buy this note of me, you can transmit me the proceeds by crediting it to the Exchange Bank of Ong, and I will take the money from the bank and use it. Note, also: "I think that my indorsement on same will make it secure." Would the Bank of St. Joseph understand from that that the Bank of Ong was to be responsible for it, or was it the indorsement of J. O. Walker that they relied upon? The letter is a series of similar positive statements that the note belonged to him personally, and was not the property of the bank. If I sell a note to the bank, I instruct them how to send me the money. This Walker did. "If you can handle this note *for me*, you can credit the Exchange Bank of Ong, Nebr., *for my use*." He distinguishes between himself and the Bank of Ong, and

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tells them that they are handling the note for him and the money is his, the Bank of Ong being merely the conduit for transferring his money to "my (Walker's) use." If the St. Joseph bank had not been satisfied to take the note from Walker, relying upon his indorsement and his representations as to his purchases of real estate and as to his personal responsibility, it should, and no doubt would, have required something to indicate that the Bank of Ong was interested in the transaction. If, as between Walker and the Bank of Ong, the note belonged to Walker and not to the bank, and the St. Joseph bank had notice of that fact, I do not see how they can now hold the Bank of Ong for the loss.

FAWCETT, J., concurs in this dissent

DAVID H. HARDING, APPELLEE, v. BOARD OF EQUALIZATION,
APPELLEE; C. E. FIELDS, INTERVENER, APPELLANT.

FILED NOVEMBER 14, 1911. No. 17,080.

Taxation: LIQUOR LICENSES. The privilege granted a licensee to sell intoxicating liquors is not subject to assessment for taxation under the provisions of chapter 77, Comp. St. 1911, which in substance provide for *ad valorem* taxation.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Affirmed.*

James B. Kelkenney, for appellant.

James P. English, Thomas F. Lee and Benjamin S. Baker, contra.

ROOT, J.

But one question is presented in this case, and that is whether a privilege granted by a license to sell intoxicating liquors is subject to *ad valorem* taxation. The dis-

strict court held that it is not. Such licenses are but mere temporary permits to the licensee to do that which without it would be unlawful. The licensee does not thereby become vested with any property right, within the meaning of section 3, art. I of the constitution, which provides: "No person shall be deprived of life, liberty or property without due process of law." *Pleuler v. State*, 11 Neb. 547; *Martin v. State*, 23 Neb. 371; *Dinuzzo v. State*, 85 Neb. 351. The privilege is purely personal; it may not be transferred by the act of the licensee or by operation of law; it may be canceled by a repeal of the statute authorizing the granting of licenses, or by an amendment thereto requiring the payment of a greater sum than formerly, and it may be summarily revoked for any cause provided by statute or by the ordinance under which it was used.

In *City and County of San Francisco v. Anderson*, 103 Cal. 69, it was held that the right to a seat in a voluntary association, known as the "Stock Exchange," does not contain such elements of property as to be subject to taxation. To the same effect is *Baltimore City v. Johnson*, 96 Md. 737. The reasons underlying the district court's decision that the privilege granted by the license is not taxable by valuation are stronger than those sustaining the last cited cases. There is no statute specifically authorizing the levy of a tax by value in addition to the payment of the license money, and we are of opinion that no such right exists.

The judgment of the district court is

AFFIRMED.

STATE, EX REL. JEAN MCKEE, APPELLEE, v. ROBERT W. PORTER, APPELLANT.

FILED NOVEMBER 14, 1911. No. 17,149.

1. *Mandamus*. "A mandamus proceeding in Nebraska is an action at law." *State v. Farrington*, 86 Neb. 653.

2. ———: REVIEW. A motion for a new trial in the district court is necessary in mandamus proceedings to entitle the defeated litigant to be heard on questions of fact in this court.

APPEAL from the district court for Harlan county:
HARRY S. DUNGAN, JUDGE. *Affirmed.*

John Everson, for appellant.

Keester & Strout, Thomas & Shelburn and J. G. Thompson, contra.

ROOT, J.

This is a proceeding in mandamus, instituted in the district court, to compel the respondent to deliver to the relator the books, money, stationery, receipts, furniture and other articles belonging to the office of city treasurer of the city of Alma. The relator prevailed, and the respondent appeals.

The record does not disclose whether the judgment has been executed, but since the district court refused to grant a supersedeas, and we have not been requested to supersede the judgment, it is reasonable to presume that the relator has possession of the money, records and all other indicia of the office referred to in the writ.

The respondent pleaded in his return that the relator is a woman, and therefore ineligible to hold the office. The affidavit for the writ does not disclose the relator's sex, unless the fact is established by the form of the relator's first name. The word is the French form of John. Webster's New International Dictionary, p. 2517. It is, however, used as an abbreviation of the word Jennie. Testimony was received, over the relator's objection, on this point. We find no motion for a new trial in the transcript, hence we are not required to examine the sufficiency of the evidence to sustain the findings. Such a question must have been raised by the filing of a motion for a new trial in the district court in order to entitle

the respondent to be heard here. *State v. Farrington*, 86 Neb. 653.

We are induced to hold the respondent to a strict compliance with the rules of practice, because he has attempted to hold an office beyond the term to which he was elected, and in opposition to the relator who holds a certificate of election therefor, and in this we are convinced he is in no manner attempting to vindicate the public right. If he is serious in his contention that the public welfare, rather than his private interests, impels him to litigate the relator's right to the office, he may accomplish his purpose by prosecuting the *quo warranto* action which he has instituted against the relator. We do not find it necessary to pass upon the relator's eligibility to hold the office of city treasurer.

The judgment of the district court is

AFFIRMED.

LETTON, J., concurring.

I concur in the conclusion. It is shown that an action in *quo warranto* to try the title to the office is pending. The issue sought to be tried here ought to be determined in that, which is the proper action. There is no reason to import such an issue into this case when it has previously been presented in the proper manner.

SEDGWICK, J., dissenting.

The statute governing cities of this class provides: "All officers shall be qualified electors and taxpayers and reside within the limits of the city." Comp. St. 1911, ch. 14, art. I, sec. 9. The real question in this case is whether, under this statute, a woman can be qualified to hold this office. The majority opinion does not pass upon or recognize this question, and gives technical reasons for not doing so. Those reasons to my mind are wholly unsound. It is said that whether this relator is a woman is a fact to be tried by the court, and, as no motion for a new trial was filed in the court below, this court cannot

review the evidence and determine whether the relator is a woman. This reason for the decision was discovered by this court; it is not mentioned in relator's brief, and was not suggested upon the oral argument. The opinion departs from the established rule of this court, in determining the case upon a technicality not presented in the brief.

The case was tried below upon a stipulation of facts, in which it is stated that the relator is a woman. She is described in the stipulation as Miss McKee, and was so described in her certificate of election. "Jean" McKee could deceive the trial court, and cause that court and this to believe that there was a question of fact to try whether or not she was a woman. If the letters of her first name had been arranged in different order, "Jane" McKee would have failed to compel this office to be turned over to one who, the law says, cannot hold it. In her petition and alternative writ she refers to the respondent by the use of a masculine pronoun 13 times, and refers to herself 30 times, but she never refers to herself by the use of a pronoun.

Upon the argument in this court, it was stated by counsel for relator that the relator is a woman. The whole record shows that no such question was tried below. Relator's brief occupies a dozen pages in an attempt to prove that a woman can hold the office of treasurer in such a city. It is not intimated that any such question has been tried in the court below, or that any one ever claimed that relator is not a woman, and yet this court on its own motion makes the objection that there was no motion in the court below asking that the court again try the question whether the relator is a woman, and because no such motion was filed the court here will conclude that she was not a woman.

It is not necessary to justify the action of the legislature in disqualifying women to hold this office. No good reason is apparent for such legislation. Women can hold the office of treasurer in larger cities, and can hold other more onerous offices. The legislature, when its attention

is called to the matter, may change the statute which controls in this case; the court cannot change it. I feel constrained to dissent from the principle announced in the majority opinion, because of the application that can be made. If the relator were an infant of ten years, or were confined in the penitentiary for a long term under sentence for embezzlement, or in the asylum for incurable insane, the principle would be the same. Under this decision we would install her in the office until in *quo warranto* proceedings she could be removed therefrom.

The position and conduct of the respondent have nothing to do with the matter. It is the relator's application that we are adjudicating. No investigation of fact is necessary. The whole case depends upon one question of law. Is a woman qualified to hold this office under the statute? That question of law can be determined in this action as well as in any. There is no reason to install her in the office first, and then determine afterwards, as a matter of law upon the undisputed facts, whether she can hold the office.

I think the decision is wrong, because no motion for new trial is necessary in the court below when the record shows that the case was tried and presented there upon a question of law, and no matter of fact was in dispute; because this court has always held that it will not determine a case upon a point not presented in the briefs, and it is not suggested by relator in the brief nor upon the oral argument that any motion for new trial was necessary in the court below; because the point upon which the case is decided is extremely technical, is not raised by either party, and is incorrectly determined in the opinion; because this decision, if followed as a precedent, will enable a child of tender years, a convict, or one incurably insane to obtain possession of any office and hold the same until removed by another action, which appears to be absurd, and is a very dangerous doctrine.

FAWCETT, J., concurs in this dissent.

LOUIS KEEZER ET AL. V. STATE OF NEBRASKA.

FILED NOVEMBER 14, 1911. No. 17,179.

1. **Homicide: INFORMATION: REQUISITES.** In charging murder while the accused is attempting to perpetrate a robbery, it is not necessary to allege that the act was committed deliberately and with premeditation.
2. ———: ———: **PROOF.** These allegations not being essential in stating the offense, if made, may be rejected as surplusage, and need not be proved separate and apart from proof of the killing while the accused is in the perpetration of the robbery.
3. ———: **EVIDENCE.** In the case at bar, since the jury might well find from the evidence beyond all reasonable doubt that the accused planned to waylay, assault and rob two men, and did carry their plan into execution by assaulting the men, robbing one of them and beating the other so that he died, the triers of fact might logically find that the last described victim was assaulted with the intent on the part of the accused to rob him, although they denied the intent and there is no direct evidence that his person was searched or any property taken therefrom.
4. ———: **INSTRUCTIONS.** In that state of the proof, the court having instructed the jury that the accused were presumed to be innocent, they were not entitled to a further instruction that the presumption is that no such intent existed and no attempt was made.
5. **Criminal Law: INSTRUCTIONS: CREDIBILITY OF WITNESSES.** The rule announced in *Preuit v. People*, 5 Neb. 377, that "where informers, detectives, or other persons employed to hunt up testimony against the accused are called to testify against him, he is entitled to an instruction to the jury that in weighing their testimony greater care should be exercised than in the case of witnesses who are wholly disinterested," will not ordinarily apply to a county attorney, a sheriff, or to his deputy.

ERROR to the district court for Cass county. HARVEY
D. TRAVIS, JUDGE. *Affirmed.*

Benjamin S. Baker, for plaintiffs in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton*, contra.

Root, J.

The plaintiffs in error prosecute a joint petition to secure the reversal of a judgment of life imprisonment upon a conviction of murder while attempting to rob Mike Geno.

Briefly stated, the facts are that Geno, Martin and Sanders, about 8 o'clock P. M., were by the accused waylaid in a secluded place, and Sanders and Geno beaten with clubs into insensibility, and Sanders robbed. Martin escaped, and Sanders survived the assault, while Geno did not recover consciousness, but died the succeeding day. The accused admitted to the sheriff and to the county attorney that they assaulted the men and robbed Sanders, and that the robbery was planned during the day, but each charged the other with being the controlling factor in the transaction. Sitzman signed a written statement in substance as we have stated, but did not therein admit that the assault was premeditated. During the trial the accused testified, in substance, that, while searching for a cow, they were reviled and assaulted by Sanders and Geno, and the injuries to these men were inflicted by the accused in self-defense, and that Sanders' pocket-book having fallen from his pocket during the affray was taken by the accused, and its contents divided between them; that they were induced to make statements to the officers by a promise that it would be better for them to do so, as thereby they would escape with a light sentence; and each denied having admitted that they planned the assault, or that they intended to take the money stolen until incidentally they noticed the pocket-book on the ground.

It is argued by counsel for the accused that the court did not instruct as to venue, but in this he is in error. In instruction numbered 1, the jury were told that the material allegations were, among other things, that the assault and attempt occurred in Cass county, Nebraska, and in instruction numbered 2, they were further informed that the burden of proof was upon the state to prove by

the evidence beyond a reasonable doubt every material allegation in the information.

The information contained four counts. The first charged deliberate, wilful and premeditated murder; the second charged the killing of Mike Geno while the accused were attempting to rob and while robbing Geno and Sanders; the third count charged Keezer with striking the fatal blow, and that Sitzman was present, aiding and abetting; while the fourth count charged that Sitzman inflicted the fatal wounds, and that Keezer was present aiding and abetting. Before any testimony was taken, counsel for the accused requested the court to compel the county attorney to elect whether to prosecute upon the charge in the second count that the murder occurred while the accused were attempting to rob or while they were robbing Geno, and also to elect whether he would prosecute for the murder of Geno while the alleged felonies were being perpetrated on Geno or on Sanders. Thereupon the prosecutor, with the court's permission, struck from this count all reference to Sanders, and elected to prosecute on the charge of murder while the accused were attempting to rob Geno. In this count the pleader in charging the assault stated that the accused "did, then and there purposely and of their deliberate and premeditated malice, strike, beat," etc. The accused requested the court to instruct the jury that, although the prosecutor was not compelled to charge premeditation or deliberation, yet, having done so, it was incumbent upon the state to prove those elements beyond all reasonable doubt to justify a verdict of guilty. This request was refused, and in no part of the court's charge with reference to the second count were the jury told that they could not convict unless they were satisfied that the accused acted deliberately and with premeditation.

Section 3 of the criminal code is as follows: "If any person shall purposely and of deliberate and premeditated malice or in the preparation or attempt to perpetrate any rape, arson, robbery, or burglary, or by administering

poison, or causing the same to be done, kill another; or, if any person by wilful or corrupt perjury or subornation of the same, shall purposely procure the conviction and execution of any innocent person, every person so offending shall be deemed guilty of murder in the first degree, and upon conviction thereof shall suffer death or shall be imprisoned in the penitentiary during life, in the discretion of the jury."

The allegations, essential to charge murder in the first degree when the accused takes human life while committing any of the felonies enumerated in this section have been fully considered by this court, and, while some of its members have refused to concur in the majority opinions, it has uniformly been determined that it is not necessary to charge deliberation or premeditation or a purpose to kill. *Morgan v. State*, 51 Neb. 672; *Rhca v. State*, 63 Neb. 461; *Taylor v. State*, 86 Neb. 795. For the purposes of this case, we shall only discuss the presence and effect of the words "deliberate and premeditated." Counsel for the accused is correct in admitting that these words need not be included in a charge of murder in the first degree where the accused is charged with murder while perpetrating or attempting to perpetrate a robbery. Bishop, Directions and Forms (2d ed.) sec. 532; Archibold, Criminal Pleading (24th ed.) p. 890; *State v. Van Tassel*, 103 Ia. 6.

The general rule concerning the effect of nonessential allegations in an indictment is stated in Archibold, Criminal Pleading (24th ed.) p. 363: "Allegations which are not essential to constitute the offense, and which may be omitted without affecting the charge, or vitiating the indictment, do not require proof, and may be rejected as surplusage." See, also, Joyce, Indictments, sec. 265. In *Morgan v. State*, *supra*, it was held that the mental condition present when murder in the first degree is committed is "incontrovertibly presumed from the crime of rape, in the perpetration of which the homicide is alleged to have been committed," and this principle is sustained by many authorities. *State v. Van Tassel*, *supra*; Washing-

ton v. State, 25 Tex. App. 387; *Moynihan v. State*, 70 Ind. 126; *State v. Brown*, 7 Or. 186; *People v. Mooney*, 2 Idaho, 17; McClain, Criminal Law, sec. 355. In the instant case the same result flows from proof that Geno was killed while the accused were attempting to rob him.

Counsel for the accused also argue that, since no intervening cause prevented them from robbing Geno and they did not do so, his requested instruction, that the presumption is that no such an intention existed, should have been given, and that there is no proof to sustain the charge of an attempted robbery of this man. No one other than the accused actually knows whether Geno was robbed or whether they intended to rob him, Sanders was insensible, Martin had fled, and Geno did not recover consciousness, so his statement was not before the jury. For some reason, the state made no proof of the condition of Geno's pockets when he was first discovered after the assault, nor did it prove whether there was any valuable property on his person before or after the assault. However, the accused admitted in their separate confessions that they planned robbing Geno as well as Sanders, that both men were assaulted at the same time, and that Sanders was robbed. From all of the facts and circumstances proved by the evidence, the jury were justified in finding that the accused intended to rob Geno at the time they assaulted him. The court did instruct the jury generally that the accused were presumed to be innocent, and that this presumption continued until the state proved their guilt beyond all reasonable doubt. In this condition of the record, the accused were not entitled to the instruction requested. The proof is also sufficient to sustain the charge.

Counsel for the accused finally complain that the court did not give his requested instruction that the jury should scrutinize with greater care the testimony of witnesses engaged in hunting up evidence than the testimony of the other witnesses. The witnesses to whom this instruction was intended to apply are the county

attorney, the sheriff and the deputy sheriff of Cass county. In *Previtt v. People*, 5 Neb. 377, the rule was announced that "where informers, detectives, or other persons employed to hunt up testimony against the accused are called to testify against him, he is entitled to an instruction to the jury that in weighing their testimony greater care should be exercised than in the case of witnesses who are wholly disinterested." This decision was followed in *Heldt v. State*, 20 Neb. 492, and in *Sandage v. State*, 61 Neb. 240. This is an exception to the general rule that the credibility of witnesses is solely for the jury to determine, and that the court should not attempt to influence the jury by discrediting the testimony of any witness, and does not find universal support in the decisions of other courts, nor in the books written upon this subject. Rapalje, Law of Witnesses, sec. 189; Underhill, Criminal Evidence (2d ed.) sec. 280a, and authorities there cited. The county attorney, the sheriff and the deputy sheriff are not spies, informers or detectives dependent upon a conviction for a pecuniary reward, and in the circumstances of this case we shall not extend the rule to include them within its ban.

Some other immaterial matters are referred to in the briefs, but we find nothing in the record prejudicial to the accused.

The judgment of the district court is

AFFIRMED.

M. S. MCININCH, APPELLANT, v. DAVID W. EVANS ET AL.,
APPELLEES.

FILED NOVEMBER 14, 1911. No. 16,974.

1. Sales: BONA FIDE PURCHASERS. A verbal lien on personal property is void as to subsequent purchasers in good faith.
2. ———: ———: PRESUMPTIONS. There is no presumption that a stranger to an oral agreement creating a verbal lien has knowledge of its existence.

3. ———: ———: **BURDEN OF PROOF.** As a general rule the burden of proving that a stranger to an oral agreement creating a verbal lien on personalty has knowledge thereof is on lienor, where that fact is material to his protection.
4. **Replevin: POSSESSION AS EVIDENCE OF OWNERSHIP.** While defendant's possession of a chattel, when replevied, is presumptive evidence of ownership, such possession loses its presumptive character when plaintiff adduces evidence showing that he bought the chattel from the owner, that he paid for it, and that he is entitled to possession.
5. ———: **DEFENSES: SECRET LIENS: BURDEN OF PROOF.** After plaintiff in replevin has adduced proof showing that he bought the chattel in controversy from the owner, that he paid for it, and that he is entitled to possession under his purchase, the burden is on defendant, where he attempts to defeat the case thus made and to establish his own right of possession by proof of a verbal lien to which plaintiff was a stranger, to show that plaintiff, before completing his purchase, had notice of such lien.
6. **Trial: INSTRUCTIONS: BURDEN OF PROOF.** Where the law imposes on defendant the burden of proving a material fact on which he relies, the plaintiff is entitled to an instruction so advising the jury.

APPEAL from the district court for Nemaha county:
LEANDER M. PEMBERTON, JUDGE. *Reversed.*

M. S. McIninch and William G. Rutledge, for appellant.

Kelligar & Ferneau and Fred G. Hawxby, contra.

ROSE, J.

M. S. McIninch, plaintiff, replevied from David W. Evans, defendant, May 19, 1909, a red Oakland automobile. The answer of defendant was a general denial. Harry W. Moore appeared as intervener, answered plaintiff's petition by a general denial, and in addition pleaded these facts: May 6, 1909, intervener negotiated with the Lininger Implement Company of Omaha for the purchase of two automobiles—the red Oakland replevied and a white Oakland. Not having the funds to make advance payments on the purchase price, defendant furnished the

Lininger Implement Company \$1,500 for that purpose, and, to secure payment thereof, both cars, with intervener's consent, were delivered to defendant, who has since held them as security. No part of the sum thus secured has been repaid. Subject to defendant's interest, intervener is the owner of the red car. When suit was commenced, intervener was engaged in buying, selling and repairing automobiles in Auburn, where the cars described were kept in his garage for defendant under the latter's directions. The trial court was asked to determine that defendant was entitled to possession of the red car, that he had a lien thereon for \$1,500 and interest, that intervener was the owner thereof and entitled to possession, subject to defendant's lien, that the red car was wrongfully seized by plaintiff under the writ, that it be returned to defendant, and that intervener recover from plaintiff damages in the sum of \$1,500. The reply was a general denial.

The proof on behalf of defendant and intervener tended to support the allegations in the latter's answer. Plaintiff adduced proof tending to show: May 1, 1909, plaintiff agreed to buy and intervener to procure in Omaha, and sell at cost, an automobile like the one replevied. At the time, plaintiff paid \$400 on the purchase price. A few days later he was in the garage of intervener at Auburn, looking at a new automobile, and the latter told him that was his car. Part of the equipment not yet having been furnished, plaintiff stated to intervener that he would leave the car there, awaiting the equipment. Plaintiff returned May 8, 1909, found his car covered with mud, and ordered intervener to clean it and leave it in the garage. It remained there a week. May 15, 1909, it was taken to another garage and kept in the possession of defendant until seized by plaintiff in this suit. When it was in the garage of intervener, the latter told plaintiff he was going to Omaha for the white car, and for the purpose of raising money to get it he asked plaintiff to pay the balance due on the purchase price of the red one, saying he would

bring the missing equipment back with him. Plaintiff told him he could send his own check to the Nemaha County Bank for about \$1,200 and that plaintiff would take it up. May 12, 1909, the bank received and plaintiff paid intervenor's check for \$1,406. The same day intervenor credited plaintiff's account at the bank \$200, and the former owed him \$40 for supplies. The net result of the transactions, according to plaintiff's evidence, is that he purchased from intervenor the identical automobile replevied, that he paid therefor the sum of \$1,566, the purchase price in full, and that the property was delivered to him.

The jury found that defendant was entitled to possession and fixed the value thereof at \$400. As between plaintiff and intervenor, the right of property and the right of possession were found to be in plaintiff. From a judgment on the verdict plaintiff has appealed.

Plaintiff requested, and the trial court refused, the following instruction: "The court instructs the jury that the burden is upon the defendant Evans to establish his lien upon the automobile in question, and that unless you believe from a preponderance of the evidence that said Evans had a lien upon said automobile, and that said McIninch had knowledge of such lien before said McIninch purchased the same, then in that event you will find for the plaintiff as against the claims of said defendant Evans."

This instruction was not only refused, but there was nothing in the entire charge to advise the jury that the burden of proof was on defendant to show plaintiff had notice or knowledge of the verbal lien. Did the trial court err in failing to give the requested instruction? Defendant's lien was not evidenced by any writing or public record of which plaintiff was required to take notice. It was a mere verbal or secret lien, binding only on the parties who created it and on those having actual notice or knowledge of its existence. It was void as to subsequent purchasers in good faith. *Ostertag v. Galbraith*, 23 Neb. 730. When defendant accepted security in the form of a secret agreement, he allowed the automobiles to be kept

by his debtor for sale. It should not be presumed that strangers to the oral agreement had knowledge of its terms, when negotiating for the purchase of the automobiles. As a general rule, the burden of proving that a stranger had knowledge of such an agreement rests on the lienor, who is acquainted with its provisions, if that fact is material to his protection. *Rogers v. Pierce*, 12 Neb. 48. Plaintiff's proofs showed that he bought the red car from intervener, that it was delivered to him, that he paid the purchase price, and that he was entitled to possession. The testimony showing the purchase and payment by plaintiff was not successfully refuted. The burden was on him to show his right of possession at the commencement of the suit. His proof was sufficient for that purpose, but in making a *prima facie* case he was not in addition required to go further and assume the burden of proving that defendant had no verbal lien entitling him to possession, or, if he did have such security, that plaintiff had no knowledge or notice of its existence. The law, of course, is that at the commencement of the trial defendant's possession was presumptive evidence of ownership, but it lost its presumptive character when plaintiff proved by direct testimony that he bought the red car, owned it, and was entitled to possession. *First Nat. Bank v. Adams*, 82 Neb. 801.

To defeat plaintiff's case, as made by the evidence already outlined, defendant offered proof of a verbal lien, which was void as to subsequent purchasers in good faith. As to plaintiff, this lien was no justification whatever for defendant's possession, the right to which had already been disproved, without evidence of notice to plaintiff. Having relied on his verbal lien to defeat the right of plaintiff to possession, as shown by his evidence, the burden was on defendant to prove that plaintiff had actual notice or knowledge of the oral agreement before completing his purchase. Since plaintiff was right on his theory of the law, he was entitled to an instruction that the burden of proving such notice rested on defendant. *Omaha Bottling Co. v. Theiler*, 59 Neb. 257.

Kiddle v. Kiddle.

If the instruction requested, when standing alone, is open to criticism as assuming the fact that plaintiff bought the red car, that feature would not have prejudiced defendant, because other parts of the charge made it clear that plaintiff could not recover, unless the jury found from the evidence that plaintiff was the absolute owner.

Under the peculiar circumstances disclosed by the evidence and the nature of the controversy, it is clear, on the whole record, that plaintiff's case was prejudiced by the failure to give an instruction advising the jury where the burden of proving notice belonged. The judgment is therefore reversed and the cause remanded for further proceedings.

REVERSED.

FAWCETT, J., not sitting.

LETTON, J., concurs in the conclusion.

MARGARET MAY KIDDLE, APPELLEE, v. ELMER J KIDDLE,
APPELLANT.

FILED NOVEMBER 14, 1911. No. 16,545.

1. **Husband and Wife: SUIT FOR MAINTENANCE: ALLOWANCE OF ATTORNEY'S FEES.** It is the settled rule in this court that in a suit by a wife for separate maintenance, or for alimony alone, the court may at any time during the pendency of the suit make allowance to the wife of a reasonable sum as suit money, including attorney's fees, to be paid by the husband as the court may direct.
2. ———: ———: ———: **PENDENCY OF SUIT.** And by the term "during the pendency of the suit" is meant any time from the commencement of the suit until and including the final order of dismissal of the same.
3. ———: ———: ———. And the fact that after the employment of counsel and the commencement by them of such suit, and prior to the entry of such allowance, the parties to such suit become reconciled does not oust the court of its authority to make such allowance.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Affirmed.*

McKenzie, Howell & Co., for appellant.

H. S. Daniel and *John A. Moore*, *contra.*

FAWCETT, J.

Plaintiff brought suit in the district court for Douglas county for separate maintenance for herself and the minor children of plaintiff and defendant, and for the custody of such children; and from an order allowing her \$200 as attorney's fees, to be taxed as costs in the case, defendant appeals.

The petition was filed June 17, 1909. On the same day an application for the allowance of the attorney's fees in question was filed, and on the next day notice was given defendant that the same would be called for hearing on June 22. At the request of defendant the hearing was continued and was not had until July 22. After defendant obtained the continuance, and before the hearing, he and his wife became reconciled and resumed their marital relations. Notwithstanding such reconciliation the court made the allowance above noted. The suit was not dismissed until January 12, 1910, when, upon the motion of defendant, it was dismissed *nunc pro tunc* as of July 31, 1909, the date of entry of the order of July 22, 1909. Defendant now urges that such reconciliation deprived the court of authority to make the allowance complained of. To permit the defendant to obtain a continuance of the hearing upon the application for attorney's fees until he could bring about a reconciliation with his wife, and then interpose such reconciliation as a ground for defeating the application, would be so contrary to every dictate of justice that such permission would never be granted by a court of equity, unless compelled to do so by some statute or rule from which

there is no escape. Fortunately, no such statute or rule exists in the present case.

Upon the general proposition that no allowance can be made for past services, nor after a reconciliation, counsel cite *Beadleston v. Beadleston*, 103 N. Y. 402; *McCarthy v. McCarthy*, 137 N. Y. 500; *Reynolds v. Reynolds*, 67 Cal. 176; *Loveren v. Loveren*, 100 Cal. 493; *Lacey v. Lacey*, 108 Cal. 45; and *McCulloch v. Murphy*, 45 Ill. 256. In the Illinois case it is said: "Moreover, although in our state divorces are easy of attainment, yet it is the duty of the courts to promote, as far as possible, a peaceful adjustment of these difficulties." We think it is just as much the duty of the courts to compel honesty and fair dealing on the part of a man who has had trouble with his wife, as it is to promote a peaceful adjustment of his marital difficulties. We think the reasoning of Mr. Chief Justice Cole in *Sumner v. Sumner*, 54 Wis. 642, is probably nearer the mark, viz.: "It may be a salutary admonition to him to govern himself and regulate his conduct in future, if he is required to pay the amount adjudged by the court below."

As opposed to the authorities cited by defendant, we have *Fullhart v. Fullhart*, 109 Mo. App. 705, 83 S. W. 541; *Courtney v. Courtney*, 4 Ind. App. 221, 30 N. E. 914; *Sprayberry v. Merk*, 30 Ga. 81; *Langbein v. Schneider*, 16 N. Y. Supp. 943; and *Davis v. Davis*, 141 Ind. 367. In *Sprayberry v. Merk*, *supra*, the closing paragraph of the opinion reads: "As to the settlement which took place in this case between the husband and wife, after she had got the services of her counsel, it is scarcely necessary to remark that the counsel, after having acquired a right to compensation for his services by rendering them at the request of the wife, could not be settled out of that right by arrangement to which he was no party." In *Courtney v. Courtney*, *supra*, it is held: "Under Rev. St. 1881, sec. 1042, which vests in the court, 'pending a petition for divorce,' power in its discretion to require the husband to pay such sum as will enable the wife to prepare her

case for trial, an order may be made requiring him to pay her attorneys for services already rendered, although the parties become reconciled, and the action is dismissed." (30 N. E. 914.) In *Fullhart v. Fullhart*, *supra*, it is held: "Where a wife instituted a suit for divorce, and, prior to the hearing of a motion for temporary alimony and attorney's fees, became reconciled to her husband, and resumed matrimonial relations, she was nevertheless entitled to suit money to compensate the attorney whom she had employed for the services rendered." (83 S. W. 541.) In the opinion, it is said: "We know of no principle of law by which a woman, who has a meritorious cause of action for divorce employs an attorney to institute and prosecute such an action, can, after it has been instituted and carried on for some time, deprive him of his right to compensation for the services so rendered in that action by a reconciliation with her husband, followed by a resumption of cohabitation. It would seem that upon the clearest principles of common honesty, as well as law, an attorney in such a predicament ought to be compensated for the services rendered, and that the wife should be allowed suit money for that purpose." The reasoning of the cases above cited appeals to us as eminently sound, and more in harmony with the holdings of this court upon questions of divorce and separate maintenance than that contained in the New York, California and Illinois cases above cited.

Counsel for defendant urge that in an action like the one at bar "the court does not act as a court exercising general chancery jurisdiction, but derives such powers as it has solely from the statute," and cite *Aldrich v. Steen*, 71 Neb. 57, and *Cizek v. Cizek*, 69 Neb. 800. We do not see how that question arises in this case. The question involved here is the power of the court to make an allowance in favor of the wife for attorney's fees after there has been a reconciliation, or to make such an allowance for services which have been already rendered.

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Section 12, ch. 25, Comp. St. 1911, provides: "In every suit brought, either for a divorce or for a separation, the court may in its discretion require the husband to pay any sum necessary to enable the wife to carry on or defend the suit during its pendency." By the term "during its pendency" is meant any time from the commencement of the suit until and including the final order of dismissal. *Brasch v. Brasch*, 50 Neb. 73. The order in this case having been made before, or at least at the time, and as a part of, the final order of dismissal, the fact that the allowance was for services which had theretofore been rendered in the case, and the further fact that there had been a reconciliation of the parties, are alike immaterial. The power of the court to order the payment of suit money in the suit of a wife for separate maintenance is fully sustained in *Earle v. Earle*, 27 Neb. 277; *Cochran v. Cochran*, 42 Neb. 612; *Rhoades v. Rhoades*, 78 Neb. 495; *Brewer v. Brewer*, 79 Neb. 726; *Sample v. Sample*, 82 Neb. 37; and *Hoon v. Hoon*, 82 Neb. 688. That the sum allowed was reasonable is not denied.

The question discussed in the last paragraph of appellee's brief is not before us, and cannot be considered.

AFFIRMED.

VILLAGE OF WAKEFIELD, APPELLEE, v. FRED W. UTECHT
ET AL., APPELLANTS.

FILED NOVEMBER 14, 1911. No. 16,947.

1. **Municipal Corporations: ANNEXATION OF TERRITORY.** Section 8977, Ann. St. 1909, construed, and held broad enough to permit a village located upon the border of one county, in a proper case, to annex contiguous territory situated in an adjacent county.
2. ———: ———: **BURDEN OF PROOF.** In an action to annex additional territory to a village, the burden is upon the village to establish by sufficient averments and evidence that the territory sought to be annexed will be benefited by the annexation, or that justice and equity require that such territory be annexed.

2. Evidence examined and set out in the opinion held not sufficient to sustain the decree.

APPEAL from the district court for Wayne county:
ANSON A. WELCH, JUDGE. *Reversed.*

Frank A. Berry and Frederick S. Berry, for appellants.

J. M. Paul and A. R. Davis, contra.

FAWCETT, J.

The village of Wakefield, incorporated and lying in Dixon county, and bordering on Wayne county, presented its petition to the district court of the latter county for the annexation of certain territory within that county to the corporate limits of said village. From a decree annexing such lands defendants have appealed.

The grounds urged for a reversal are (a) that the evidence is insufficient to support the findings and decree; and (b) that the court was without authority to annex to a village in one county contiguous territory lying in another county. We will consider these two assignments in reverse order.

Defendants contend that there is no law in this state which authorizes a village situated in one county to annex contiguous territory lying in another county; that "section 9034 of the same statute (Ann. St. 1909) gives to a village the authority to annex territory of an adjoining county when the said village is located in two or more counties. This act was passed in 1903, and the legislature recognized the fact that under the law a village incorporated such as Wakefield had no authority to annex contiguous territory of another county, but the legislature has not yet passed a law that authorizes annexation of the territory in another county where the village is wholly located within one county." They cite *Tabor & N. R. Co. v. Dyson*, 86 Ia. 310, in support of their contention. An examination of the case shows that the statute under

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which the town of Tabor was incorporated provides, "The inhabitants of any part of any county" may incorporate; and the court say: "The act permitting original incorporation limits the organization to 'the inhabitants of any part of any county,' and we think a fair construction of the provisions for annexation means that extensions may be made within the county. No reason exists, to our minds, why there should be a limitation at the original organization of an incorporation to a part of one county, and then permit it, by annexation, to embrace parts of two or more counties. The reasons against such an organization are as actual and manifest in one case, as in the other." When the Iowa statute is compared with section 8881, Ann. St. 1909, under which it is conceded plaintiff village was incorporated, it will be seen that the above authority is not in point. The Iowa statute limits a village, when incorporating, to "the inhabitants of any part of any county," showing that such incorporation is clearly limited to the inhabitants of the county within which the village is situated; while our statute (section 8881) contains no such limitation. It reads: "Any town or village containing not less than two hundred nor more than fifteen hundred inhabitants, now incorporated as a city, town, or village, under the laws of this state, or that shall hereafter become organized pursuant to the provisions of this act, * * * shall be a village, and shall have the rights, powers and immunities hereinafter granted, and none other, and shall be governed by the provisions of this-subdivision," etc.

As will be seen, there is nothing in section 8881 which in terms forbids the incorporation of a village situated in two or more counties. Section 8881 down to the "star" was enacted in 1879. Laws 1879, p. 202. In 1881 (laws 1881, ch. 22) the other portion of the section was added, and at the same time section 99 of the act of 1879 was amended so as to read as it now appears as section 8977, Ann. St. 1909. That section provides for the au-

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nexation of contiguous territory. It reads: "When any city or village shall desire to annex to its corporate limits any contiguous territory, whether such territory be in fact subdivided into tracts or parcels of ten acres or less, or be not so subdivided, the council or board of trustees of said corporation shall vote upon the question of such annexation, and if a resolution to annex such territory, describing the same in general terms, be adopted by two-thirds vote of all the members elect of such council or board of trustees, said resolution, and the vote thereon, shall be spread upon the records of said council or board. Said city or village may thereupon present to the district court of the county in which such territory lies, a petition praying for the annexation of such territory, together with an accurate plat or map of the same. * * * If the court find the allegations of the petition to be true, and that such territory, or any part thereof, would receive material benefit by its annexation to such corporation, or that justice and equity require such annexation of said territory, or any part thereof, a decree shall be entered accordingly; and a copy of the decree of said court, duly certified under the seal thereof, together with a plat of the territory with a proper description thereof, so decreed to be annexed * * * shall be filed and recorded in the office of the county clerk or recorder of the county in which such territory lies; and from the time of filing of such decree and plat, the territory therein described shall be included in and become a part of such city or village, and the inhabitants thereof shall receive the benefits of and be subject to the ordinances and regulations of such city or village." That the legislature, in passing this act, intended thereby to authorize a village situated upon the border of a county to annex adjacent territory lying in an adjoining county seems clear. If not, why does the act provide that the petition for the annexation of such territory shall be presented to the district court "of the county in which such territory lies," and why does it further require that a copy of the decree

of the court entered in that proceeding "shall be filed and recorded in the office of the county clerk or recorder of the county in which such territory lies"? In 1893, ten years prior to the passage of section 9034, *supra*, the legislature enacted sections 9026 to 9032, inclusive. Laws 1893, ch. 9. Section 9026 was passed for the purpose of enabling the inhabitants of any village situated in two or more counties, and which had not theretofore been incorporated, to become incorporated, and prescribed the course to be pursued in securing such incorporation. After such incorporation was effected, such village would then stand upon the same footing with other villages which had been originally incorporated under section 8881, and sections 9027 to 9032 would apply to all of such villages. Section 9027 provided for the jurisdiction of justices in such villages; section 9029, that such village could use the county jail of either county; section 9030, how the tax levy should be certified; and section 9032, that all notices and other publications required by law to be published in any county in which any part of such village is situated may be published in any newspaper published in such village, and that such publication should have the same force and effect as if published in each and every county in which any part of such village is situated. Section 9033, enacted with 9034 in 1903, provides the steps to be taken by the owners of contiguous territory who might desire to have the same annexed. Section 9034 provides: "When any city or village situated in two or more counties shall desire to annex to its corporate limits any contiguous territory, whether within the counties within which said city or village is situated or otherwise, such territory may be annexed in the manner provided by section 99 of article I, of chapter 14 of the Compiled Statutes of 1901 (8977), provided that the district court of the county in which the territory sought to be annexed is situated shall have jurisdiction, and if the territory sought to be annexed is situated in more than

one county actions shall be brought in each county in which is situated any territory which it is desired to annex."

It is, in effect, argued that that section was either unnecessary or else it should be treated as a legislative construction of the former acts, to the effect that theretofore there had existed no authority for a village to annex adjacent territory situated in an adjoining county. While this argument is not without force, it is not entirely convincing. The reference in that section to section 8977, which was enacted in 1881, and which, as we have already shown, authorized a village on the border of one county to annex adjacent territory situated in an adjoining county, shows, we think, that section 9034 was intended to apply to the law generally upon that subject, and not especially to section 9026, *supra*. The intention of the legislature evidently was to relieve the question of all uncertainty by expressly extending the power of a village situated in two counties, and which borders upon still a third county, to annex territory of such third county in the same manner which section 8977 permitted a village in one county to annex territory in a second county. We therefore hold that the provisions of section 8977, *supra*, are broad enough to permit a village located upon the border of one county, in a proper case, to annex contiguous territory situated in an adjacent county. The district court for Wayne county, therefore, did not err in taking jurisdiction in the instant case.

The contention that the decree is not sustained by the evidence is not so easily disposed of. The grounds upon which adjacent territory may be annexed by a village are well defined in *Village of Hartington v. Luge*, 33 Neb. 623, as follows: "In an action to annex certain territory to a village, it must appear from the facts stated in the petition that some portion of the territory sought to be annexed will be benefited from the annexation, or that justice and equity require its annexation, and the par-

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ticular facts showing such benefits, or the justice and equity of the relief sought, must be alleged." If alleged, the allegation must, of course, be sustained by evidence. The rule above announced is reiterated in *Village of Syracuse v. Mapes*, 55 Neb. 738, and in *Bisenius v. City of Randolph*, 82 Neb. 520, and has become the settled rule in this court. These are the tests by which the right of a village to annex adjacent territory must be determined. The evidence in the record before us shows that, if the property of defendants is annexed, it will be done over their protest; will subject their property to materially increased taxation, and will fasten upon such property a lien for its proportion of \$7,000 in water bonds, \$4,500 in light bonds, all bearing interest at 5 per cent., and \$1,976.75 registered, valid warrants bearing 7 per cent. interest, which remain unpaid for want of funds in the village treasury for their payment. The effect of all this (defendants in effect testified) would be to decrease the value of their real estate, and would be a damage to each of the defendants greater than the benefit to be derived by them if annexed to the village. It is clear, therefore, that under the first test alone their property should not be annexed. The court, by its decree, found the second test in favor of the village; that is to say, it found that "justice and equity require" that the territory be annexed. The case was submitted upon the testimony of one witness and a stipulation of facts. The witness referred to is the village attorney. He testified that he is acquainted with the village, with the adjacent territory, and with all of the defendants; that the defendants all live south of the corporate limits of the village, and within 500 feet of the south boundary thereof; that he knows of one water hydrant being located "pretty near the south boundary of the city limits;" that to his personal knowledge one of the defendants uses gas and water from the village plants and pays the village therefor; that the property of defendants is occupied by them for residence purposes. The stipulation admits that plaintiff is a cor-

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poration wholly in Dixon county; that the lands sought to be annexed are all located in Wayne county; that the village has a system of waterworks "ample for the supply and protection of said village;" that it has a gas lighting plant; that both the water and light plants belong to the village, that the residents of the territory sought to be annexed do not pay any taxes into the village treasury; that the plats attached to plaintiff's petition are accurate; that the village has the indebtedness that we have already set out; states the levy of taxes for the years 1907, 1908 and 1909; that, if the trustees of the village were present, they would testify that the village is compactly built, and has within its corporate limits numerous churches, school buildings, merchandise and other establishments; that the object in seeking the annexation of the territory is for the purpose "of making room for expansion of said village, and for the revenue that will be derived from taxes collected on property sought to be annexed." That is all. It is not shown that defendants have not adequate school facilities within their own outlying additions; that they make use of the numerous churches in the village; that the village streets have been opened up to the addition with sidewalks and other conveniences which defendants are using; that the gas and water plants are ample in capacity to supply the needs of the defendants, as well as those of the village; that the village has any facilities for guarding against fire or furnishing police protection to the defendants should their property be annexed. In fact, we are unable to discover anywhere in the record evidence sufficient to sustain the finding of the court that justice and equity require the annexation of the property of defendants. We think the village has failed to meet the second test above outlined.

The judgment of the district court is therefore reversed and the cause remanded for further proceedings.

REVERSED.

CLAUS H. BONGE, APPELLANT, v. VILLAGE OF WINNETOON,
APPELLEE.

FILED NOVEMBER 14, 1911. No. 16,546.

Eminent Domain: ACTION FOR DAMAGES: PLEADING. Upon examination of the petition, it is found that a general demurrer thereto was properly sustained.

APPEAL from the district court for Knox county:
ANSON A. WELCH, JUDGE. *Affirmed.*

J. H. Berryman and Calvin Keller, for appellant.

O. W. Rice and W. A. Meserve, contra.

SEDGWICK, J.

In the district court a general demurrer was filed to the plaintiff's petition, which was sustained by the court, and, the plaintiff not desiring to plead further, the action was dismissed, and he has appealed.

In his brief the plaintiff gives the following summary of his petition: "The petition alleges that the defendant, without plaintiff's consent, and against his will, in the fall of 1908, negligently, unlawfully, and wrongfully erected a standpipe of iron and steel, about 75 feet high, with a capacity of about 1,000 barrels of water, near plaintiff's lots, and about 25 feet from his dwelling-house, by reason whereof his tenant refused to live in the house, and plaintiff thereby lost \$24 rent; that immediately before the erection of said standpipe said lots were worth \$125 each, and that the erection of said standpipe was so dangerous to life and property that its existence in that place rendered said lots practically worthless; that the defendant removed said dwelling-house to another location on one of the said lots, and by such removal damaged it in the sum of \$300 and plaintiff was damaged in the aggregate in the amount of \$700." There is also an allegation in the petition that the plaintiff's property

consists of "five residence lots of about 50 feet frontage and about 150 feet deep, and said lots are so situated and located that they are desirable and valuable for residence purposes."

The plaintiff contends that he is entitled to damages under section 21, art. I of the constitution: "The property of no person shall be taken or damaged for public use without just compensation therefor." The words negligently, unlawfully, and wrongfully have no place in the petition. There are no facts alleged tending to show that the village authorities were in any respect negligent in erecting the standpipe complained of. To furnish the village and its inhabitants with water for public use and fire protection is a laudable purpose on the part of the village, and it will be presumed that the standpipe in question was properly constructed and suitable to the purpose, unless facts are alleged which show the contrary. No objection is made to the petition in the defendant's brief on account of these allegations, and we think that the pleadings should be treated as though they alleged that the standpipe in question was a public necessity and was properly constructed.

There are two questions, perhaps, presented by this demurrer: First, Is a village liable for damages that may be caused to property by the location of a structure of this kind in close proximity thereto? Second, Does the petition sufficiently allege that the plaintiff's property has been damaged?

The first question is not much discussed in the briefs. No authorities in point are cited. There are so many interesting and difficult questions connected with it that we prefer to place our decision upon the second proposition. The petition alleges that the plaintiff's "tenant refused to live in the house, and plaintiff thereby lost \$24 rent." No facts are stated from which it can be determined whether the tenant had any sufficient reason for refusing to live in the house. This is not an allegation that the house became untenable; that people in gen-

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eral would refuse to live in the house. It is rather an allegation of whim or peculiarity on the part of this particular tenant. Again, it is alleged that "the erection of said standpipe was so dangerous to life and property that its existence in that place rendered said lots practically worthless." This is not a direct allegation that it was dangerous at all; it is a recital that it was "so dangerous." And, again, there are no allegations of fact from which it could be determined that this improvement created any conditions that rendered it in fact dangerous to life and property. How it did or could endanger either is a matter of conjecture, so far as the allegations of this petition go.

The plaintiff, for a second cause of action, alleged that the city authorities had removed the residence from one of the lots to another lot more distant from the standpipe. No facts are alleged tending to show that this was a proper and necessary part of the construction of the improvement by the city authorities. It appears to be an attempt to allege a simple trespass on the part of the officers. In such case the municipality would not be liable for the wrongful acts of its agents.

The demurrer to the petition was properly sustained, and the judgment is

AFFIRMED.

FORD SMITH, APPELLEE, V. EDWARD A. ROEHRIG ET AL.,
APPELLANTS.

FILED NOVEMBER 14, 1911. No. 16,896.

1. **Intoxicating Liquors: CONSTITUTIONALITY OF ACT.** Section 15 of the act of 1881 (Comp. St. 1881, ch. 50), commonly known as the "Slocumb law," substantially re-enacts section 340 of the criminal code of 1866. In many cases since its first enactment this court has assumed its validity, and, being satisfied that it is constitutional upon re-examination, it is so held without further discussion.

2. **Appeal: INSTRUCTIONS.** This court will not reverse a judgment of the trial court for an erroneous instruction, when it appears from the whole record that the party complaining has not been prejudiced thereby. *Aultman & Co. v. Reams*, 9 Neb. 487, *Omaha & R. V. R. Co. v. Hall*, 33 Neb. 229, *Standiford v. Green & Co.*, 54 Neb. 10, and *Shoemaker v. Commercial Union Assurance Co.*, 75 Neb. 587, distinguished.
3. ———: **EXCLUSION OF EVIDENCE.** When, in an action for damages caused by an assault, evidence is offered as to statements made by one of the parties to the assault, it is for the trial court to determine whether such statements were a part of the *res gestæ*; and if the circumstances indicate that the statements were self-serving, and made with deliberation, it will not be held to be an abuse of discretion to exclude such statements.
4. **Principal and Surety: TRIAL: PROVINCE OF JURY.** It is not the duty of the jury to find which of the defendants is principal and which are sureties, under section 511 of the code. It is not error to refuse to submit that matter to the jury to guard against prejudice when the surety is a foreign corporation.
5. **Intoxicating Liquors: ACTION FOR DAMAGES: EVIDENCE.** Evidence examined, and found sufficient to support the verdict, and that the damages are not so excessive as to require a reversal.

APPEAL from the district court for Douglas county:
HOWARD KENNEDY, JUDGE. *Affirmed.*

C. W. Britt and A. G. Ellick, for appellants.

John M. Macfarland and Albert W. Jefferis, contra.

SEDGWICK, J.

The defendant Roehrig was a licensed saloon-keeper in the city of Omaha, and the defendant the Title Guaranty & Surety Company of Scranton, Pennsylvania, was the surety on his bond as such saloon-keeper. The plaintiff began this action to recover damages for personal injuries inflicted upon him in or about the saloon of defendant, and caused, as he alleges, by the intoxication of George Weatherford and Bud Weatherford, who assaulted and injured him, alleging that the defendant sold the liquor that caused the intoxication of the said

George Weatherford and Bud Weatherford. The plaintiff recovered a judgment for \$2,000 damages, and the defendants have appealed.

1. The principal part of the brief of the defendants is devoted to an attack upon the constitutionality of the statute known as the "Slocumb law." Comp. St. 1909, ch. 50. Many reasons are given for considering this law unconstitutional. They are quite fully presented, and urged with earnestness and ability. It is maintained that the whole act is unconstitutional, but the principal attack is upon section 15, which is the basis of this action. The so-called Slocumb law was enacted in 1881, and section 15 substantially re-enacts section 576 of the criminal code as it then existed (Gen. St. 1873), which was a part of the criminal code of 1866 (sec. 340), so that this particular section has been upon the statute books for 45 years. During this time this court has considered a very large number of cases, both civil and criminal, under the various provisions of this statute, and the Slocumb law very soon after its enactment was challenged as unconstitutional. In *Pleuler v. State*, 11 Neb. 547, the question of the constitutionality of the act in general was presented by very able counsel and thoroughly considered in the opinion by Mr. Justice LAKE, and the act was held to be constitutional. This was a criminal prosecution, and did not specifically involve the provision of section 15 of the act. Again, in *Hunzinger v. State*, 39 Neb. 653, the proviso of section 1 of the act was considered, and held to be constitutional, and the court declared itself to be entirely satisfied "with the reasoning and the conclusion" in *Pleuler v. State, supra*. In cases almost innumerable this court has considered various parts of this act, and has assumed that the act as a whole is within the power of the legislature, and valid. For these reasons, while we have examined the brief in this case upon these constitutional questions with interest, we do not feel called upon to enter into an extensive discussion of the questions so presented.

2. The petition alleges that "George Weatherford and Bud Weatherford assaulted and beat this plaintiff with their fists, feet, and with hard instruments, and said George Weatherford, whilst intoxicated from the liquors sold him by the said Edward A. Roehrig, and from no other cause, and without any fault on the part of this plaintiff, struck the plaintiff in the left eye, and injured same, so that this plaintiff has lost the use of said eye, and suffered great pain in said eye until about the 30th day of September, 1908, when said left eye of this plaintiff, which before this assault was in perfect condition, and owing to the injury received, was removed from his head by a surgeon; that it became necessary to remove this eye by reason of the injury; and that owing to this injury the other eye of this plaintiff is now defective." The evidence tended to show that the plaintiff and both of the Weatherfords were drinking at the bar of the defendant, and became involved in a quarrel, and that the plaintiff was assaulted and severely beaten by the Weatherfords, and that the plaintiff's eye was injured substantially as he alleged in the petition. When the evidence was complete, the plaintiff asked leave to strike from the petition the following words: "Said George Weatherford, whilst intoxicated from the liquors sold him by the said Edward A. Roehrig, and from no other cause, and without any fault on the part of this plaintiff." The court refused to allow these words to be stricken from the petition, on the ground "that said amendment presents a theory of this case other and different from that presented in the pleadings, and upon which the case was tried, and creates a new and different issue in this case than was presented by the original petition." Under the directions of the court, the jury made special findings of fact, and found specially that George Weatherford was under the influence of liquor at the time the plaintiff was injured, and that one of the Weatherfords struck the blow that caused the injury to the plaintiff's eye which resulted in its removal, but that they were unable to determine which

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one of the Weatherfords struck the blow. The general verdict of the jury was in favor of the plaintiff, assessing his damage at the sum of \$2,000. The court instructed the jury that, unless they found that George Weatherford struck the blow that caused the injury to plaintiff's eye, they could not allow the plaintiff any damages caused by that particular injury. It is now insisted that the damages allowed by the jury in their general verdict are excessive, because under the instruction of the court the loss of the plaintiff's eye is not to be considered in estimating the damages, and the other injuries suffered by the plaintiff were not serious, and not sufficient to justify the damages allowed. It seems clear that the court should have allowed the plaintiff's request to strike out the allegation specifying which one of the Weatherfords struck the blow that caused the injury to the plaintiff's eye. That allegation, however, was immaterial, and might properly be treated as surplusage. The two Weatherfords joined in the assault upon the plaintiff, and each of them was responsible for the actions of the other in committing a joint assault. The difficulty in the case arises from the instruction of the court to disregard the injury to the eye, unless the jury could determine that George Weatherford caused that injury. The instruction was incomplete and inaccurate, if not erroneous, and should not have been given. It seems probable that the jury disregarded the instruction, since the evidence shows that the loss of his eye was the principal injury suffered by the plaintiff, and the other injuries suffered were so inconsiderable as not to justify the general verdict of the jury.

The defendants suggest in their brief that "it is a well-settled rule of law in this state that it is the duty of the jury to follow the instructions of the court, whether said instructions are right or wrong, and if they fail to do so their verdict is contrary to law, and should be set aside, and a new trial ordered." They assume that this rule is absolute and applies in the broad terms in which it is

stated to all cases under all circumstances. Mr. Thompson in his work on Trials (vol. 2, sec. 2402) says: "Of course, it can never be said that the jury were misled by the giving of erroneous instructions, where they have reached the correct result by their verdict. Accordingly, it is the practice of most of the courts, before passing upon exceptions to instructions, to look into the evidence and see if the verdict was right, and, if it is found to be so, the court will look no further." In *Tilman v. Stringer*, 26 Ga. 171, it is held that, "although the court charge the law erroneously, still, if the verdict of the jury be right, no new trial will be granted." See, also, *Pratte & Cobanne v. Judge of Court of Common Pleas*, 12 Mo. 194; *Hannum v. Belchertown*, 19 Pick. (Mass.) 311; *Potter v. Hopkins*, 25 Wend. (N. Y.) 417. These and other early cases hold that when the court can see from the whole record that the party complaining has not been prejudiced by the erroneous instruction, and justice has been done in the case, the error will be disregarded, and the judgment affirmed. Later cases in the several states have generally followed this rule. We think that this rule is sound, and that the decisions of this court, when carefully examined, are not necessarily inconsistent with it.

In *Aultman & Co. v. Reams*, 9 Neb. 487, in an opinion by Mr. Justice COBB, this court said: "Whether right or wrong, it was the duty of the jury to respect and obey the instructions of the court, and for their failure to do so the verdict should have been set aside; and it was error for the district court to refuse to do so." He cites as authority for this statement the case of *Jewett & Root v. Smart & Gillett*, 11 Ia. 505. In that case the trial court granted a new trial, "upon the ground that the verdict was contrary to the evidence and the instructions of the court." The appeal was taken from this order of the trial court granting a new trial. The supreme court refused to reverse the order, remarking that, "whether right or wrong, it was the duty of the jury to regard them

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as the law." In this state no appeal is allowed from an order granting a new trial until after the new trial is had and the case finally disposed of in the trial court. The Iowa decision might very well be cited as authority in a case where the instruction of the trial court was right, and the jury disregarded both the instruction and the evidence, but it is not authority for the proposition that the judgment of the trial court must be reversed in all cases where the jury has disregarded an erroneous statement of the trial court upon an immaterial point. *Aultman & Co. v. Reams, supra*, was an action on a promissory note. On the trial the plaintiff called the defendant as witness to prove his signature to the note, and the defendant denied the signature, whereupon the plaintiff asked the court to dismiss the action without prejudice, which the court refused to do. This was the principal error complained of, and for this reason the judgment of the district court was properly reversed. The cause was submitted to the jury, and the verdict was rendered for \$35 damages. The court instructed the jury "that upon the evidence in this case, in any event, you can only find nominal damages, as no actual damages are proved." The opinion shows that there was no evidence supporting this finding of the jury. The instruction of the court was correct. When the evidence entirely fails to sustain a cause of action or a counterclaim, it is the duty of the court to so instruct the jury and to enforce that instruction. This the trial court had failed to do, and there is no doubt of the correctness of the conclusion of this court upon this point. If the statement of the court in the opinion is to be construed that in all cases and under all circumstances the judgment must be reversed if the jury disregards an immaterial or erroneous instruction of the trial court, it was dictum merely, and should not be regarded.

In *Omaha & R. V. R. Co. v. Hall*, 33 Neb. 229, the first paragraph of the syllabus is as follows: "It is the duty of a jury to find its verdict in accordance with the law

as given in the instructions of the court. When they clearly violate this duty, the court should set aside their verdict. The refusal of the court to do so upon proper application is reversible error." This was an action for damages for personal injury. It appeared that after the injury the surgeon of the defendant company had, at the company's request, treated the plaintiff's injury. It was insisted by the plaintiff that this surgeon did not use ordinary care, skill and diligence in treating him. The jury rendered a general verdict for the plaintiff, with a special finding that the surgeon did use ordinary care, skill and diligence in treating the plaintiff. The trial court, it appears, gave general instructions in regard to the assumption of risk and the negligence of fellow servants. These instructions, as quoted in the opinion, appear to be substantially correct, but the court said that it was not necessary to decide whether they correctly stated the law, because under those instructions there was no evidence that could support the verdict on the ground of negligence of the defendant company, unless it was because the surgeon had improperly treated the injuries of the plaintiff, and as the jury had found in a special verdict that the surgeon did not improperly treat the plaintiff the verdict was wholly unsupported by the evidence. The petition alleged that in unloading coal from one of the defendant's cars the fellow servant "carelessly and negligently threw a large and heavy lump of coal upon plaintiff's right hand, crushing the same." The evidence followed the petition, so that there was no doubt that the negligence of a fellow servant was the primary cause of the injury. The substance of the court's instruction to the jury was to the effect that under such circumstances the plaintiff could not recover. There was therefore total failure of evidence to support the plaintiff's case, and the judgment was rightly reversed. It is manifest that, although the rule of law in regard to the duty of the jury to follow the instructions of the court is somewhat broadly stated, yet it was

intended to apply only under the peculiar circumstances of that case. The earlier case of *Meyer v. Midland P. R. Co.*, 2 Neb. 319, is cited as authority for this statement of the law. In the *Meyer* case the law is stated in the syllabus as follows: "If the jury disregard the testimony and the instructions of the court, and return a verdict not supported by the former, nor in obedience to the latter, their finding should be promptly set aside, and a new trial ordered." And the opinion shows that the instruction given by the court was a correct statement of the law, and that it appeared from the evidence that the jury had disregarded both the instruction of the court and the evidence in the case.

In *Standiford v. Green & Co.*, 54 Neb. 10, the question was as to the validity of a chattel mortgage. The court instructed the jury that "if at the time the mortgage was given the plaintiffs and Westfall secretly agreed that possession was to be taken of the goods, that plaintiffs should sell sufficient to satisfy their own claim, and thereafter continue to sell and apply the proceeds to the payment of other debts of Westfall * * * then the mortgage was void, and the jury should find for the defendant." The undisputed evidence showed "that the mortgage was given in pursuance of such an agreement as was outlined in the instruction." The instruction submitted the only question involved in the case. There was nothing for the jury to determine except the question of fact covered by this instruction. The court, by IRVINE, C., said: "We need not inquire whether the instruction was correct in law. It was given, and it was the duty of the jury to obey it. The verdict was rendered in manifest disregard of the instruction, and is for that reason contrary to law." The opinion quotes from *Aultman & Co. v. Reams* and *Omaha & R. V. R. Co. v. Hall*, *supra*. The decision is manifestly right, and it is not necessary to inquire whether the language used is so general that it might be applied improperly under other circumstances.

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587, was an action upon an alleged agreement to insure; no policy having been issued. The trial court instructed the jury that the burden was upon the plaintiff to establish "that the plaintiff agreed to pay, and did pay, the premium to the defendant, the Commercial Union Assurance Company." The court said that "the case was brought and tried on the theory that, the defendant having offered to insure the property for a certain premium, and the plaintiff having accepted such offer and paid the premium, the defendant is bound by a contract of insurance," and that there was no competent evidence tending to establish the fact of payment of the premium. The action being brought upon an offer to insure, and an acceptance thereof and payment of premium, it was necessary to prove that such payment was made. The evidence failed upon that point, and the judgment was properly reversed. We do not find it necessary to overrule, or even criticise, the decisions of this court in the cases cited. We are satisfied that the language used in these opinions should not be extended to cases like the one at bar.

In this case the instruction of the court relied upon is inaccurate and incomplete, if not erroneous. If, while the two men were jointly assaulting the plaintiff, one of them struck the blow which caused the injury, both would be equally responsible, and in that sense it may be said the finding of the jury that one of these two men struck the blow is equivalent to finding that George Weatherford struck the blow, as originally alleged in the petition. If this view is taken, the instruction is inaccurate and incomplete. If the instruction is to be construed to mean that plaintiff could not recover unless George Weatherford personally and individually struck the blow, it is erroneous, and, as before stated, the jury has manifestly disregarded it. Unless it appears from a consideration of the whole record that this action of the jury in disregarding this statement of the court was without prejudice to the defendant, or if it appears that the verdict might probably have been different

if the erroneous instruction had been omitted, a new trial would be necessary, and the judgment should be reversed. We find from the whole record that this instruction could not have influenced the verdict prejudicially to the rights of the defendants.

3. After the assault complained of, and George Weatherford had gone out of the saloon upon the sidewalk, he met an officer, who appears to have asked him some questions. Upon the trial the defendant offered to prove that at that time George Weatherford told the officer that the plaintiff "had tried to cut him with a razor." The court refused to allow this testimony, and it is now insisted that this was part of the *res gestæ*, and should have been allowed. We do not think that the court improperly exercised its discretion in this matter. The conversation with the officer was no doubt very soon after the assault, and possibly while the witness Weatherford was somewhat under the excitement caused by the difficulty in the saloon, but the inclination to justify one's self before an officer of the law might lead to self-serving statements, and it is not so clear that these statements of the witness were competent as to require a reversal for abuse of discretion on the part of the trial court.

4. The defendants requested the following instruction: "You are instructed that, should you return a verdict in this case against the defendants, the liability of the Title Guaranty & Surety Company herein would be that of a surety merely, and that, before plaintiff would be permitted to call upon said surety for the payment of any part of a judgment rendered upon said verdict, the law of this state requires him to first exhaust all of the property of the defendant Roehrig, both real and personal, within the jurisdiction of this court." So far as the rights of the plaintiff are concerned, the statute appears to make the principal defendant and his surety jointly and severally liable, and if, as between the principal defendant and his surety, the surety was entitled to the benefit of the provision of section 511 of the code, the jury has nothing

to do with that matter. It is the duty of the clerk, under the directions of the court, "in recording the judgment thereon, to certify which of the defendants is principal debtor, and which are sureties or bail." No error of the clerk in that regard is suggested in the motion for new trial, and this court cannot now consider the point. It is, however, urged in the brief that the surety company was entitled to this instruction, "because of the well-known prejudice that exists in the minds of the ordinary juror against corporations, and particularly against foreign corporations." We cannot, however, presume that jurors will so far disregard their oaths as to be influenced by such conditions. It is the duty of the trial court, so far as practicable, to see that the jury is not improperly prejudiced or influenced in the trial of the case; and the jury should render the verdict without prejudice or favor, and without regard to the character or condition of the respective parties. This court must assume that the trial court and the jury have done their duty, unless it affirmatively appears otherwise. We cannot say from this record that the jury were prejudiced against either of the defendants, or that the giving of the requested instruction is a proper method of guarding against such prejudice.

5. It is insisted in the briefs that the damages allowed by the jury are excessive. It is said that it is not established by the evidence that George Weatherford struck the plaintiff at all; but the plaintiff, and at least one of the other witnesses, testified that he did, and that question was for the jury. And, further, as we have already pointed out, the evidence shows clearly that these two parties together, with perhaps another, attacked and assaulted the plaintiff, and that before and at the time of the attack these parties were all drinking at the bar of the principal defendant. Under this evidence, it was a question of fact for the jury as to whether the plaintiff sustained damages "in consequence of such traffic * * * in intoxicating drinks," within the meaning of section 15 of the Slocumb

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law, as explained to them in the instructions of the court. The argument upon the theory that no damages should be allowed for the loss of the plaintiff's eye is disposed of by the discussion of that question.

The judgment of the district court is

AFFIRMED.

ROSEL P. SCOTT, APPELLEE, v. GEORGE DEGRAW, APPELLANT.

FILED NOVEMBER 14, 1911. No. 16,935.

1. **Limitation of Actions: PLEADING AND PROOF.** In this state the statute of limitations is a statute of repose; it prevents recovery on stale demands. If the petition in an action upon a promissory note sets out the note which shows upon its face that it is barred by the statute, and partial payments are also alleged in the petition which would remove the bar of the statute, and such payments are denied in the answer, with the allegation that the note is barred, the plaintiff cannot recover without evidence of such payments.
2. ———: **NOTES: PAYMENTS ON COLLATERALS.** When collaterals are transferred by the maker of a note as security therefor, payment on such collaterals will be considered as payment on the principal note by the maker thereof, in the absence of any agreement to the contrary, as of the time that such payments were actually made upon the collaterals, and not of the time that they may have been received by the holder of the principal note from one in whose hands he has placed the collaterals for collection.
3. ———: **EVIDENCE.** The evidence in this case fails to prove that any payment was made upon the note in suit within the five years next before the action was begun.

APPEAL from the district court for Morrill county:
HANSON M. GRIMES, JUDGE. *Reversed.*

G. J. Hunt, for appellant.

Williams & Williams, contra.

SEDGWICK, J.

The defendant executed and delivered to one J. W. Harper his promissory note for \$750, dated March 11, 1901, and due on the 11th day of December, 1901. The plaintiff brought this action upon this note, alleging that the said Harper had assigned the note to him without recourse, and that two several payments, one of June 14, 1901, and the other July 15, 1901, were indorsed on the note, and alleging 13 other credits by cash paid to the plaintiff. The allegation was that 11 of these payments to the plaintiff were made in the years 1901, 1902, and 1903, one payment in 1904, and another payment of \$6 on the 7th day of February, 1905. The action was begun on the 31st day of December, 1909. The note sued upon appeared upon its face, as alleged in the petition, to be barred by the statute of limitations. It was not alleged in the petition that any payment had been made to the plaintiff within the five years prior to the commencement of the action, except a payment of \$6 on the 7th day of February, 1905. The petition would have been demurrable as showing upon its face that the action was barred by the statute of limitations, but for this allegation of the payment of \$6 in February, 1905. These allegations of payment were denied in the answer.

In an action upon a promissory note, if the note upon the face appears to be barred by the statute of limitations, the petition fails to state a cause of action, unless it also contains allegations of fact which show affirmatively that the statute has not run against the note. *Hedges v. Roach*, 16 Neb. 673. The statute of limitations in this state is a statute of repose; it is not to be construed as merely raising a presumption of payment; it destroys the right of action. *Mayberry v. Willoughby*, 5 Neb. 368, 25 Am. Rep. 491; *Chapman v. Kimball*, 7 Neb. 399; *Gatling v. Lane*, 17 Neb. 80. When it does not appear upon the face of the petition, the defendant must plead it, and the party pleading the facts must prove them. *Van Burg v. Van Engen*, 76 Neb. 816. When the plaintiff, as in this

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case, brings his action upon a promissory note which shows upon its face that more than five years elapsed after the maturity of the note before the commencement of the action, and then to remove the bar of the statute pleads payments on the note within the five years, and these allegations of payment are denied in the answer, with an allegation that the action is barred, the plaintiff must prove the alleged payments in order to remove the apparent bar of the statute. This is the precise point determined in *Hedges v. Roach*, *supra*.

The answer also alleged that at the time of the execution of the note the defendant "transferred and delivered to said Harper, as collateral security for the payment thereof, a number of notes payable to defendant, all dated February 25, 1901, and running for one year, payable at Sidney, Nebraska, with 6 per cent. interest from date, the total of the face of which said notes exceeded in the aggregate the amount of the note herein sued upon." This allegation is supported by the evidence, and is not disputed. The evidence further shows that the said Harper and this plaintiff were both interested in the note and entitled to the proceeds thereof, although the note was taken in the name of Harper only as payee, and also shows that it was agreed between the parties to the note that the collateral notes should be left with the Bank of Nebraska of Sidney, of which one Martin was cashier, for collection.

When notes are transferred as collateral to the principal note, in the absence of any agreement to the contrary, the law implies that payments upon the collaterals are payments upon the principal note, and the notes having been left at the bank by agreement of the parties without any evidence of any agreement as to the application of the proceeds of the collaterals, these proceeds must be considered as paid upon the principal note when they were received by the cashier, Martin. The evidence shows that before the note sued upon had been indorsed to this plaintiff, which was some six years after it is dated, payments made upon the collateral notes to Martin were by him for-

warded to Harper, the original payee in the note, and by him, in turn, paid to this plaintiff. None of the payments received by the plaintiff, Scott, were indorsed upon the note.

A paper was offered in evidence entitled "Credits by cash paid to R. T. Scott." Then followed a statement of dates and payments corresponding to those alleged in the petition, showing the one credit of \$6 on the 7th of February, 1905, and no other credits within the five years prior to the commencement of the action. This paper was objected to as incompetent and immaterial, but, the cause being tried to the court without a jury, the objection was overruled and the paper was received in evidence. It is now insisted that this was error, but, as the trial court will not be presumed to have based its decision upon incompetent evidence, it is only necessary for us now to consider whether upon the whole competent evidence before the court it sufficiently appears that any payment was made upon this note within the five years before the commencement of the action. We think the evidence entirely fails in this respect. There is nothing in the record to show how much time elapsed after the payment of the \$6 to Martin, the cashier of the bank, if indeed the evidence sufficiently shows that such payment was made at all, before the money was paid over to the plaintiff. If this \$6 was paid to the bank before the 31st day of December, 1904, more than five years elapsed from that time before the commencement of the action. Martin, it appears, as before stated, turned over these payments to Harper, and Harper paid them to Scott. The fact, if it is a fact, that Scott received it February 7, 1905, does not prove that it was paid to Martin at that time or at any time within the 38 days prior thereto. The allegation of the plaintiff's petition that these payments were made within the five years next before the commencement of the action is wholly unsupported by the evidence.

The judgment of the district court is reversed and the cause remanded.

REVERSED.

LETTON, J., concurring in conclusion.

The petition pleads the note and credits thereon, which on the face of the pleading show that the action was not barred. All that is said in the answer with reference to the statute of limitations is as follows: "Nor did he ever hear from said Harper or the plaintiff, until long after the statute of limitations had run against said note, that any balance was claimed to be due thereon; that, if any of the notes so transferred to said Harper were not paid and paid promptly, it was the fault of said Harper, and not by reason of any extension granted or permitted by this defendant, and any pretended claim of any balance due thereon would be and is barred by the statute of limitations." The general rule is that a plea of the statute which merely avers the pleader's conclusion of law is bad. 13 Ency. Pl. & Pr. 214. This is the rule that has been adopted by this court in every case that has been presented to it before the present one. *Scroggin v. National Lumber Co.*, 41 Neb. 195; *Dufrene v. Anderson*, 67 Neb. 136; *Pinkham v. Pinkham*, 61 Neb. 336. It seems to me the opinion as it now stands is directly opposed to these authorities, and overrules them without saying so.

I am inclined to think, however, that the case should be reversed on the other points mentioned in the opinion.

ROOT, J., concurs in the opinion of LETTON, J.

THEODORE STANISICS V. STATE OF NEBRASKA.

FILED NOVEMBER 28, 1911. No. 17,059.

ERROR to the district court for Lancaster county: EDWARD J. CORNISH, JUDGE. Opinion on application for conditional order of revivor. *Application denied.*

E. P. Holmes and *G. L. DeLacy*, for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton*, contra.

PER CURIAM.

Theodore Stanisics, after being convicted of the crime of arson, sentenced to seven years' imprisonment in the penitentiary, and adjudged to pay the costs of prosecution, appealed to this court. Pending the appeal Stanisics departed this life, and the administrator of his estate moves to revive the cause in the administrator's name, to the end that he may contest the validity of the conviction and thereby relieve the estate of his decedent from any liability to pay those costs.

Section XV of the Bill of Rights provides, among other things, that "no conviction shall work corruption of blood or forfeiture of estate." The judgment of conviction, therefore, will not prevent the convicted man's legal representatives from succeeding to his property rights, and they are not prejudiced by the judgment, except in so far as it may impose a liability on the dead man's estate to pay the costs of prosecution and of the appeal. This fact was held sufficient in *State v. Ellvin*, 51 Kan. 784, to authorize a revivor in the name of the representatives of a deceased convict.

This case, so far as we are advised, stands alone, and is in conflict with many other cases where the principles of law involved in the Kansas case were considered. In the well-considered case of *O'Sullivan v. People*, 144 Ill. 604, 20 L. R. A. 143, the subject is clearly and exhaustively discussed, and the conclusion is announced that the convict's death abated the appeal.

The real issue in a criminal prosecution is the defendant's guilt or innocence. A judgment for costs following a conviction is but an incident to the judgment of conviction. If the judgment of conviction cannot be

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reviewed, the incident cannot be considered. *State v. Martin*, 30 Or. 108. The cases on this subject are collated in 12 Cyc. 825.

It will serve no good purpose to extend this opinion by further discussion. The appeal abated with the convict's death. The application for a conditional order of revivor is therefore

DENIED.

C. M. GRUENTHER, APPELLEE, V. BANK OF MONROE,
APPELLANT.

FILED NOVEMBER 28, 1911. No. 17,030.

1. **Justice of the Peace: APPEAL: AMENDMENT OF PETITION.** In an action instituted before a justice of the peace, plaintiff alleged that, upon the representation of defendant bank that the drawer of a check had money on deposit to pay the check, the check was received, but when presented at the bank payment was refused, the defendant falsely claiming that the drawer had no funds wherewith to pay the same. On appeal to the district court, where the cause was tried upon the original pleadings, plaintiff was allowed to amend by inserting in the bill of particulars that, prior to the presentation of the check, the drawer had left with defendant the sum named in the check for the express purpose of paying it and which sum the bank retained. *Held*, That the amendment did not change the cause of action.
2. **Appeal: REPLY.** "Where the parties to an action enter upon a trial and treat the allegations of new matter alleged in the answer as denied, this court will also treat it so notwithstanding no reply appears in the record." *Loan & Trust Savings Bank v. Stoddard*, 2 Neb. (Unof.) 486.
3. **Pleading.** "Pleading affirmative matters in an answer, which amount to no more than a denial of plaintiff's cause of action, will not necessitate a reply." *Peaks v. Lord*, 42 Neb. 15.
4. **Banks and Banking: CHECKS: ACCEPTANCE.** Where a check is issued upon a deposit in a bank, and the payee notifies the bank of the receipt of the check, and the drawer subsequently withdraws his deposit, but leaves with the bank the exact amount required to pay the check, with instructions to pay it when

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presented, and the money is accepted and retained for that purpose, the bank will be liable to the payee of the check without reference to section 9330, Ann. St. 1911, which requires an acceptance of a check to be in writing.

APPEAL from the district court for Platte county:
GEORGE H. THOMAS, JUDGE. *Affirmed.*

A. M. Post and M. Whitmoyer, for appellant.

Reeder & Lightner, contra.

REESE, C. J.

This action was commenced before a justice of the peace in Platte county. The cause was appealed to the district court, where judgment was rendered in favor of plaintiff. Defendant appeals.

As the pleadings in the justice court were, by agreement, adopted in the district court, it will be necessary to notice the bill of particulars and answer thereto as filed in the inferior court. It is alleged by plaintiff, in substance, that defendant is a bank incorporated under and by virtue of the laws of this state; that on the 7th day of March, 1910, A. J. Beckwith, a customer of defendant, who had an account with it, made his check thereon for the sum of \$129.60; that before the delivery and acceptance by plaintiff of said check plaintiff informed defendant that Beckwith desired him to accept the check, and inquired if the same was good, and was informed by defendant that the check was good and would be paid on presentation, whereupon plaintiff accepted the check, relying on the representations of defendant, paying Beckwith the said sum of \$129.60; that afterward, in the regular course of business, the check was presented, payment demanded, and refused by defendant, defendant falsely claiming that Beckwith had no funds in its hands wherewith to pay the same, but that it retained the check; that Beckwith was insolvent, having no property other than his account in said bank,

as defendant well knew, and that Beckwith has since left this state. Judgment was demanded for the \$129.60, with interest and costs.

Defendant answered by admitting its corporate character; alleging that no note or memorandum was made by it, or any one authorized so to do, of the promises alleged in the bill of particulars; that the action was not prosecuted by the real party in interest, but in behalf and for the benefit of said Beckwith. A general denial of all unadmitted allegations of the bill of particulars was made. No other pleadings were filed in the district court.

At the close of the evidence plaintiff was permitted to amend the bill of particulars by inserting therein the averment that, "prior to the presentation of said check to the defendant, said defendant received from said Beckwith the sum of \$129.60 for the express purpose of paying his said indebtedness to plaintiff, and still retains said money in its possession notwithstanding said fact." A proper exception was taken by defendant.

It is insisted that this amendment changed the cause of action from that upon which the suit was brought before the court of original jurisdiction. It is true that the facts stated in the bill of particulars in the justice court were that the check was accepted upon defendant's representations that it was good and would be paid on presentation, but, when presented, it was falsely claimed that Beckwith had no funds wherewith to pay the same. This was equivalent to a charge that it had the funds. It may be doubted if the amendment added anything to these averments, but it is clear that the suit during the whole history of the case was for the \$129.60 involved in the transaction, and for nothing else, and therefore the "cause of action" was not changed.

It is also insisted that, as it was distinctly alleged in the answer that the suit was not prosecuted in the name of the real party in interest and was not denied by a reply, the allegation must be taken as true, and is a com-

plete defense to the action. We are unable to find that this question was raised upon the trial by objections to evidence or otherwise, but that the case was as fully tried upon all issues permissible as though a reply had been filed. It is the settled law of this state that, if such is the case, no prejudicial error is committed. *Western Horse & Cattle Ins. Co. v. Timm*, 23 Neb. 526; *Missouri P. R. Co. v. Palmer*, 55 Neb. 559; *Loan & Trust Savings Bank v. Stoddard*, 2 Neb. (Unof.) 486; *Minzer v. Willman Mercantile Co.*, 59 Neb. 410; *Gross v. Scheel*, 67 Neb. 223. However, it is doubtful if this averment was anything more in its effect than a denial of that fact would have been, and, if so, no reply was necessary. *Peaks v. Lord*, 42 Neb. 15.

This suit is what has been heretofore designated as an action at law, and is not triable *de novo* in this court, and the finding of the district court upon questions of fact cannot be disturbed unless clearly wrong. If the case turned on the matter of the acceptance of the check, the provisions of section 9380, Ann. St. 1911, that the acceptance of a bill must be in writing in order to bind the drawee, might be applied, and the evidence of such acceptance would be wanting. But under the evidence that is not this case. There was evidence that after the conversation between plaintiff and defendant, which was by telephone, but before the check was presented, the drawer withdrew his deposit from the bank, but directed it to withhold the sum of \$129.60 to meet and pay a check for that sum which he had given, and which was done. This would obviate the application of the statute above referred to, as well as other cited sections upon the same or cognate subjects.

The evidence shows that plaintiff was the clerk of the district court; that Beckwith had been convicted of a misdemeanor, the fine and costs amounting to \$129.60. He was taken into custody and brought to the office of the clerk, when he inquired as to the amount of money it would take to pay what was charged against him. On

being informed that it was \$129.60, he proposed giving his check on the defendant bank, located at Monroe, in that county, when plaintiff called the bank by telephone and made the inquiry above mentioned, and was informed that Beckwith had funds on deposit to protect the check, and plaintiff stated that he would accept the check, which was agreed to by the bank. Plaintiff accepted the check and receipted the judgment, and, when the money was withdrawn, Beckwith left \$129.60 to pay an outstanding check. After the withdrawal of the money the bank officers re-examined the account, there being two—one known as the "sale account," the other as his check account; that the check account had been overdrawn, which was not observed at the time of the payment of the money to Beckwith. In the meantime Beckwith started to leave the state. The president of the bank followed him to Columbus and received from him the sum of \$80, which with the \$129.60 a little more than paid the overdraft. Beckwith immediately left the state, leaving no property.

It is insisted that plaintiff was not a holder of the check in question for value, having parted with nothing in exchange therefor. This contention is based upon the claim that the judgment against Beckwith was not satisfied of record and could yet be enforced. The evidence shows without contradiction that, after having received the response from defendant that there was money on deposit with which the check could be paid, plaintiff accepted the check, gave Beckwith a receipt in full for the amount of the fine and costs, and noted the receipt on the criminal docket. Beckwith immediately left the jurisdiction of the court and of the state. We are impressed with the belief that it would be quite difficult for plaintiff to avoid having to report the \$129.60 as collected and account for it. In that event the contention would have to fail. The receipt to Beckwith and the entry on the record would be against plaintiff. But as Beckwith left the money in the hands of defendant to pay the particular

check, the bank knowing beforehand that it was out, we are at loss to see how defendant can maintain that contention. The money left with defendant was devoted to that specific purpose, so accepted and held. The bank had a plain duty to perform, which was to pay it over.

We find no prejudicial error in the finding and judgment of the district court. The judgment is therefore

AFFIRMED.

ROOT, J., dissenting.

For the following reasons, I cannot concur in the majority opinion: The plaintiff testifies that before accepting the check he talked over the telephone with the defendant's cashier, a Mr. Hill, and told him that Beckwith was about to give a check on the defendant, and asked if it was good, to which Hill, after an interval, responded that Beckwith had sufficient credit to protect the check, and that Hill, in response to the plaintiff's statement that he would take the check, responded, "All right," or something to that effect. This conversation was plainly insufficient to create any liability on the part of the defendant to the plaintiff. "A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check." Comp. St. 1911, ch. 41, sec. 188. "The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee," etc. Chapter 41, *supra*, sec. 131. "An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value." Chapter 41, *supra*, sec. 134. "A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this chapter applicable to a bill of exchange payable on demand apply to a check."

Chapter 41, *supra*, sec. 184. If the statute controls the legal status of the parties to this case, a recovery in the plaintiff's favor cannot be sustained. *Van Buskirk v. State Bank*, 35 Colo. 142, 117 Am. St. Rep. 182; *Lewin v. Greig, Jones & Wood*, 115 Ga. 127; *Erickson v. Inman*, 34 Or. 44; *Baltimore & O. R. Co. v. First Nat. Bank*, 102 Va. 753; *National Bank v. Berrall*, 70 N. J. Law, 757; *Tibby Bros. Glass Co. v. Farmers & Mechanics Bank*, 220 Pa. St. 1; *Pease & Dwyer v. State Nat. Bank*, 114 Tenn. 693.

The majority opinion refuses to apply the statute for the alleged reason "that after the conversation between plaintiff and defendant, which was by telephone, but before the check was presented, the drawer withdrew his deposit from the bank, but directed it to withhold the sum of \$129.60 to meet and pay a check for that sum which he had given, and which was done." The fact is that the defendant did not withhold \$129.60 or any other sum.

The evidence is uncontradicted that shortly before the check was drawn Beckwith sold his personal property at a public sale at which the defendant's cashier acted as clerk. The proceeds of the sale were deposited in the bank, and as a matter of convenience were credited under the designation of a sale account. At the same time Beckwith carried another account, which was overdrawn, in the defendant's bank. Beckwith had no special deposit nor a deposit for a special purpose, so the defendant was his debtor for the net credit in his favor after deducting the overdraft in the one account from the credit in the other. 1 Morse, Banks and Banking (4th ed.) sec. 327; *Pedder v. Preston*, 9 Jur. (Eng.) n. s. 496, 10 Weekly Rep. (Eng.) 773. Hill, the cashier, with whom the plaintiff talked over the telephone, was absent at the time Beckwith stated to Mr. Webster, the officer of the defendant in charge of the bank, that he wanted to withdraw his balance, less \$129.60, the amount of a check outstanding which he desired paid. Mr. Webster inspected the

sales account, but did not know of and did not inspect the other account, and stated to Beckwith the amount of the sales account less \$129.60. Beckwith drew his check for that balance, and, when it was paid, received more than the amount of his net credit with the defendant. Mr. Webster testifies that Beckwith said that the check had been given in part payment of the purchase price of a tract of land, but the plaintiff testifies that Mr. Webster admitted to him that Beckwith said the check had been given to the plaintiff. It is immaterial which statement is the more accurate. Mr. Webster did not promise that the bank would pay the \$129.60; no credit was given the plaintiff or any other person by the defendant for that sum; the defendant received nothing from Beckwith as the result of the transaction; the outstanding check was an ordinary check not payable out of any particular fund, and the bank was guilty of no fraud.

If it be conceded that the transaction amounted to an assignment of \$129.60 of Beckwith's credit with the bank to the plaintiff, and upon no other ground can the majority opinion be upheld, it should be remembered that, unless the plaintiff thereafter in reliance thereon so acted that the defendant should be estopped to deny the scope of that assignment, the assignee will stand in the shoes of the assignor, and can exact from the defendant no more than Beckwith could have demanded had the assignment not been made. 2 Story, Equity Jurisprudence (13th ed.) sec. 1047. No one will presume to say that the defendant by its mistake became liable to Beckwith for the \$129.60, and it seems reasonable to say that the plaintiff in the circumstances of this case should not be permitted to recover if Beckwith could not. Beckwith's conversation with the defendant's officer, that individual's examination of Beckwith's account, the computation made and announced, and the drawing and payment of the check for the supposed balance, were all parts of the same transaction, which should be considered together in the light of the facts, and when this is done it

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will be understood that the defendant did not owe Beckwith and nothing was transferred to the plaintiff.

This inquiry does not involve any question of negligence. The bank was not the plaintiff's agent or trustee. There was no privity between them, and it owed him no duty not to make a mistake in ascertaining Beckwith's balance. The plaintiff did not rely on that computation because he did not know of the transaction until the trial of this case, at which time he amended his petition as stated in the majority opinion.

It seems to me there is nothing in the facts of this case to deprive the defendant of the protection of the statute quoted, *supra*, and that the majority are insensibly controlled by the former decisions of this court with respect to the rights of a check-holder.

The judgment of the district court should be reversed and the action dismissed.

BARNES and ROSE, JJ., concur in this dissenting opinion.

IN RE NICHOLAS A. SHUE.

NICHOLAS A. SHUE, APPELLEE, v. C. H. LEE ET AL.,
APPELLANTS.

FILED NOVEMBER 28, 1911. No. 17,323.

1. **Intoxicating Liquors: LICENSES: APPLICANTS.** A license to deal in intoxicating liquors is in the nature of a personal trust, and if it be shown that the applicant for such license has violated the law by engaging in the sale of liquors without a license therefor, and has also permitted others to carry on the business in his name, but in which he had no interest, although he may have a license, he is not a proper person to whom a license should be granted.
2. ———: ———: **TRANSFER.** A village board has no authority to permit the transfer of a license to sell intoxicating liquors.

APPEAL from the district court for Merrick county:
CONRAD HOLLENBECK, JUDGE. *Reversed with directions*

Martin & Bockes, for appellants.

D. F. Davis and *Reeder & Lightner*, contra.

REESE, C. J.

An application was made to the village board of Silver Creek by Nicholas A. Shue for a license to sell intoxicating liquors. A remonstrance was filed, which contained a general denial of the averments of the petition, and an affirmative allegation that the applicant had violated the provisions of the Slocumb liquor law within the past year. The petition alleged that the applicant was a "man of good moral character," and the denial of this averment cast the burden of proof of this issue upon the party alleging it. The license was granted by the board, and the remonstrants appealed to the district court, where the decision of the board was affirmed. Remonstrants appealed to this court.

A number of questions are presented as to the qualifications of the signers of the petition, but as the question of the fitness of Shue to be the repository of the trust imposed by the law will, of necessity, be a controlling one, no attention need be given to the others.

It is shown that for the year ending May 1, 1910, one Cachmark had a license to sell liquors in Richland, Colfax county, and that about the 1st of March, of that year, Shue purchased Cachmark's saloon, and without authority engaged and continued in the business under Cachmark's name until the close of the license year. Then he procured a license in his own name which would terminate May 1, 1911, and during that year he resold the business to Cachmark, and allowed the buyer to conduct the business in his (Shue's) name from March 1 to May 1 without any new license having been procured. It goes without saying that both these transactions were fraudulent.

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lent and in direct violation of law. A license must be issued, if at all, to the real party. *In re Tierney*, 71 Neb. 704. "A license to deal in intoxicating liquors is in the nature of a personal trust, and the applicant for such privilege must be a person able, willing and competent to carry out such trust, and not delegate it entirely to others." *In re Krug*, 72 Neb. 576. The burden of proof is upon an applicant for liquor license to prove that he is a man of respectable character and standing, when such fact is denied by the remonstrance. *Brinkworth v. Shembeck*, 77 Neb. 71. In this case the applicant showed by his own testimony that at least in the two instances he has violated the law, and is not a proper person to be entrusted with the responsibility of a licensed seller of liquors.

On the hearing before the village board, the applicant offered to prove that he obtained the permission of the village board of Richland to continue the business under Cachmark's license. An objection to this offer was sustained. In this the board at Silver Creek did not err. The Richland board had no authority to permit a clear violation of law.

The decision of the district court is reversed, and the cause is remanded to that court, with directions to reverse the order of the village board granting the license, and, if a license has been issued, that it be revoked and canceled.

REVERSED.

IN RE CHARLES M. SOKOL.

CHARLES M. SOKOL, APPELLEE, v. C. H. LEE ET AL.,
APPELLANTS.

FILED NOVEMBER 28, 1911. No. 17,325.

Intoxicating Liquors: LICENSES: APPLICANTS. Where a bartender in charge of a saloon is shown to have sold whiskey and beer to a minor, knowing him to be such, and permitted him to drink

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the liquors at the bar, within less than one year prior to the application for a license to sell intoxicating liquors, he is not a proper person to receive such license, and his application should be denied.

APPEAL from the district court for Merrick county:
CONRAD HOLLENBECK, JUDGE. *Reversed with directions,*

Martin & Bockes, for appellants.

D. F. Davis and Reeder & Lightner, contra.

REESE, C. J.

An application was made to the village board of Silver Creek by Charles M. Sokol for a license to sell intoxicating liquors in said village. A remonstrance was filed by which a number of objections were presented, among which was the allegation that on or about the 24th day of May, 1911, the applicant sold intoxicating liquors to one Pete Newman, he being a minor of the age of 19 years. A hearing was had before the board, when a license was granted. The remonstrants appealed to the district court, where the action of the board was affirmed. They now appeal to this court.

A number of questions are presented by the briefs and were discussed upon the oral argument, but we do not find it necessary to notice any except the one above referred to, as it must control our decision.

W. J. Robinson was called as a witness by the remonstrants. He testified that on the 24th day of May, 1911, he, with one Pete Newman, went to a saloon in the village of Duncan, where he purchased liquors, and saw Newman buy from the applicant (who was then tending bar) both beer and whiskey; that Newman purchased whiskey twice and "beer several times"; that with him and Newman were two other boys, who did not go into the saloon, but remained outside the door in front. Newman was examined as a witness, and testified that he was 19 years of age; that he was in the saloon referred to with

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Robinson on the date named, and purchased from the applicant and paid him for "about seven beers and two whiskies." Elmer Carlson, one of the boys referred to as accompanying Robinson and Newman, testified that he was 16 years of age; that he remained outside and in front of the saloon at the time Robinson and Newman were within; that he saw Newman drinking both beer and whiskey in the saloon. On cross-examination he testified that he had never drunk any whiskey nor beer, but had seen them, and by seeing them in this instance he could tell what they were. He also testified that from where he stood he could not see who was behind the bar, and therefore could not identify Sokol. For the purpose of rebutting this, Sokol, the applicant, took the stand, and testified that Robinson and Newman were in the saloon on the date named; that he was tending bar for his brother, who owned the saloon; that Robinson ordered a whiskey and a bottle of pop; that he filled the order, placing the whiskey in front of Robinson and the pop in front of Newman; that he did not know the whiskey was for Newman, but saw him drink it after he (Sokol) "had turned around" to put the money in the cash drawer; that he did not sell either of them any beer, and the two drinks were paid for by Robinson.

Should we assume that the testimony of Sokol is true, and that of the other witnesses false, we are yet confronted with the fact that he saw Newman in the saloon of which he had charge; that he knew Newman was a minor, for, on being asked by his attorney if he would have served liquor to him, he answered: "I guess not, because he is not of age;" that he saw Newman drinking the whiskey at the bar, but offered no objection or word of disapproval. The testimony submitted to the district court was in writing, being a transcript of the evidence taken before the board, and, so far as is shown, the court saw none of the witnesses and had no better opportunity to weigh their testimony than this court. The witnesses Robinson, Newman and Carlson were all disinterested, financially,

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and we can see no reason why their testimony should be ignored. It is conceded that Newman drank whiskey at the bar; that Sokol knew of the fact at the time and made no objection. We can have no doubt of the truth of the testimony of the other three witnesses. It is true that the applicant is little more than a boy himself, being but 22 years of age, and, had he been of more mature years, his conduct might have been different, but this does not constitute any very cogent reason why he should be placed in sole charge of the trust which has been placed in his hands by the judgment of the board and district court. In making the sale to Newman he violated the law, and his license should have been denied.

The judgment of the district court is reversed, and the cause is remanded to that court, with directions to reverse the decision of the board of trustees, and ordering them to revoke and cancel the license, if issued.

REVERSED.

H. F. CADY LUMBER COMPANY, APPELLANT, v. GEORGE E. REED ET AL., APPELLEES.

FILED NOVEMBER 28, 1911. No. 16,548.

1. **Appeal: PRESUMPTIONS.** In the absence of a bill of exceptions, it will be presumed that an issue of fact raised by the pleadings received support from the evidence, and that such issue was correctly determined.
2. **Mechanics' Liens: TIME FOR FILING.** A subcontractor whose only agreement is with the contractor cannot extend the time within which he may file a mechanic's lien by substituting proper material for defective material theretofore furnished and charged to the contractor. *Ashford v. Iowa & Minnesota Lumber Co.*, 81 Neb. 561.

APPEAL from the district court for Douglas county:
LEE S. ESTELLE, JUDGE. *Affirmed.*

Baldrige, De Bord & Fradenburg, for appellant.

W. W. Slabaugh, William F. Wappich and L. R. Slonecker, contra.

BARNES, J.

Appeal from a judgment of the district court for Douglas county in an action to foreclose a mechanic's lien upon a house and lot situated in the city of Omaha. The case is here without any bill of exceptions, and has been submitted upon a transcript which contains the pleadings, findings, and judgment of the trial court.

It appears that in the spring of 1908 one Andrew J. Johnson, as contractor, and George E. Reed, the owner, entered into a contract for the erection of a dwelling upon the lot in question. The appellant, H. F. Cady Lumber Company, sold and delivered the material for the erection of the building to the contractor, and after its completion filed in the office of the register of deeds of Douglas county a statement to obtain a lien for the balance alleged to be due from the contractor for such materials, amounting to \$393.34. It sufficiently appears from the record that the last item of material furnished to the contractor, except the one which is now in question, was delivered to him on the 15th day of October, 1908.

The district court made the following findings: "First. The court finds that on the 21st day of December, 1908, the plaintiff made an account in writing of the items set forth in said petition, and after having made oath thereto filed the same in the office of the register of deeds, Douglas county, Nebraska, and the same is duly recorded therein as a claim of mechanic's lien upon the premises hereinbefore described.

"Second. The court finds that the first item of material delivered by the said plaintiff as aforesaid was furnished at said premises for said improvement on June 4, 1908, and the several items mentioned in said petition were furnished at said premises by the said plaintiff on the

respective dates named in the petition and in said mechanic's lien.

"Third. The court finds, however, that the item 'Nov. 6th, 3 lights glass 36 by 40½ D. S. and box,' for which a charge of \$3.23 is made in said lien and petition, was furnished by the said plaintiff, H. F. Cady Lumber Company, on the order and demand of the said Andrew J. Johnson, who was the contractor for the construction of the said improvements under and by virtue of a contract between the said Johnson, contractor, and the said George E. Reed, owner of said premises, and that in the matter of furnishing of said materials the said H. F. Cady Lumber Company was a subcontractor of the said Andrew J. Johnson, principal contractor. The court further finds that the said George E. Reed, demanded that the contractor, Johnson, should furnish said three lights of glass upon the original contract between the said Reed and Johnson for the erection of said building, and the court finds that the defendant, Johnson, in compliance with the demand of said Reed, demanded the same of plaintiff, and the plaintiff in compliance with the order of said Johnson furnished the same. The court further finds that the said three lights of glass were demanded by the said Reed and ordered by the said Johnson to take the place of three (other) lights of glass 36 by 40 inches on the claim made by said Reed that the original lights 36 by 40 inches did not fit the sashes which had been installed in said building, and the court finds that the three lights as originally installed were defective and did not fit the sashes. The court further finds that on November 18, 1908, the said contractor, Johnson, installed said three lights of glass furnished and delivered by the plaintiff on November 6, into three sashes then forming a part of said improvement, and the said Johnson took out from said three sashes the original three lights 36 by 40 inches. The court finds that the three lights furnished and delivered on November 6 were to take the place of the three lights furnished some months

before by H. F. Cady Lumber Company, for which said three lights a charge was made by plaintiff company, and plaintiff took back said defective lights.

"The court further finds that under the law the plaintiff is not entitled to a lien upon said premises."

The court thereupon rendered a judgment for the plaintiff and against the contractor, Andrew J. Johnson, for \$394.74 and costs, and dismissed the action against the defendant Reed to foreclose the alleged mechanic's lien. From that judgment, as above stated, the plaintiff has appealed.

In the absence of the bill of exceptions, it will be presumed that the evidence supports the findings of the trial court, and all other facts which could have been legally proved under the pleadings.

It is contended by the appellant that upon the findings above set forth the district court should have rendered a judgment foreclosing the mechanic's lien. It is argued that the plaintiff had 60 days from and after the 6th day of November, 1908, at which time the lights of glass above mentioned were furnished, in which to file and perfect its mechanic's lien, that the lights of glass were items furnished in pursuance of the original contract; while, on the other hand, it is contended that the lights of glass were simply substituted for those which had been previously furnished and installed in the building at a time long prior to the 6th day of November. The court so found, and upon that finding held, as a matter of law, that the plaintiff's alleged lien was not filed in time, and therefore never became a lien upon the lot in question.

The authorities upon this question in other jurisdictions are conflicting; but, whatever may be the rule in other states, we think this question has been settled by this court adversely to appellant's contention. In *Congdon v. Kendall*, 53 Neb. 282, it was held that the time for perfecting a manufacturer's lien could not be extended by supplying certain brushes in place of defective ones previously furnished and charged for. In that case

it appeared that the defendant had ordered certain mill machinery from the plaintiff, which was to be furnished to them f. o. b. Milwaukee for a specified price; that the machinery was delivered to the defendant on board the cars at their shops in Milwaukee on the 21st day of January, 1893; that the claim for a lien was not filed until May 23, 1893. It also appeared that after the machinery was set up in the mill certain brushes furnished under the contract proved to be defective, and the plaintiff supplied others in lieu thereof without additional charge or cost to the defendants. It was urged that the furnishing of the brushes extended the period for perfecting the lien. It was held that the articles furnished were furnished gratuitously by the plaintiffs for the purpose of making good their contract, and therefore did not operate to extend the time for filing the lien.

In *Ashford v. Iowa & Minnesota Lumber Co.*, 81 Neb. 561, it was held that "a subcontractor whose only agreement is with the contractor cannot extend the time within which he may file a mechanic's lien by donating material to the owner of the building nor by substituting proper material for defective lumber theretofore furnished the contractor."

We are of opinion that the case at bar should be ruled by those decisions. The trial court found that the lights of glass furnished to the contractor on the 6th day of November, 1908, were furnished as a substitute for the defective lights of glass theretofore furnished and installed in the building, and that this did not operate to extend the time in which the appellant could file its mechanic's lien.

It seems clear that the judgment of the district court was right, and it is therefore

AFFIRMED.

Smith v. Potter.

WILLIAM F. SMITH, APPELLEE, v. DAVID G. POTTER ET AL.,
APPELLEES; WALTER V. HOAGLAND, APPELLANT.

FILED NOVEMBER 28, 1911. No. 16,314.

1. **Mortgages: FORECLOSURE: OWNERSHIP OF NOTES.** If the defendant in an action to enforce a mortgage produces the notes secured thereby, and it appears that he has controlled and had undisputed possession of the instruments for many years under claim of title thereto, these facts will sustain a finding that he is the owner thereof, notwithstanding they are indorsed payable to the order of a third person. *McCabe v. Reed*, 88 Neb. 457.
2. **Process: CONSTRUCTIVE SERVICE: PUBLICATION OF NOTICE.** Where a notice for constructive service by publication is published in a semiweekly newspaper, insertion of the notice in each of the regular issues during the week is necessary to constitute a legal publication for that week. *Claypool v. Robb*, ante, p. 193.
3. **Taxation: FORECLOSURE OF LIEN: PUBLICATION OF NOTICE.** Proof of publication of notice examined, and held insufficient to show that the notice was published for the time required by statute.

APPEAL from the district court for Lincoln county:
WILLIAM H. WESTOVER, JUDGE. *Reversed.*

Hoagland & Hoagland and Henry P. Leavitt, for
appellant.

Wilcox & Halligan and Albert Muldoon, contra.

LETTON, J.

This action was brought to quiet title to a tract of land in Lincoln county. The plaintiff, Smith, claims title through a sheriff's deed issued in tax foreclosure proceedings brought by Lincoln county against David G. Potter and others. The plaintiff prevailed, and, from a judgment quieting the title in him, defendant Hoagland appeals.

In 1887 David G. Potter received a patent to the land in controversy from the United States. In 1892 he executed a note and mortgage to one Buckworth to secure the payment of a note for \$389, which note was after-

wards indorsed to the North Platte National Bank. Afterwards the bank became insolvent, one Doolittle was appointed receiver, and the note and mortgage were sold by the receiver in winding up the affairs of the bank. Defendant Hoagland claims the right to redeem from the tax lien by virtue of his ownership of this note and mortgage and of a decree of foreclosure based thereupon, and by reason of the invalidity of the tax foreclosure proceedings on which plaintiff's title to the land depends. He also alleged that the fee title to the land rested in one Waples. He filed an answer and cross-petition praying that he be allowed to redeem and that the title to the land be quieted in Waples. In 1900 Lincoln county obtained a decree of foreclosure for the delinquent taxes on the land without making a prior administrative sale. Service was had by publication, and the land was sold to satisfy this decree. In 1902 the land was purchased at sheriff's sale by the defendant Wilcox. The plaintiff, William F. Smith, derives his title by mesne conveyances from Wilcox. Plaintiff denies the ownership of the decree by Hoagland, alleges its abandonment by the receiver, and sets up a number of other defenses to the cross-action. It would unduly lengthen this opinion to set out even the substance of the lengthy and much involved pleadings, or to relate the evidence, except upon one or two points.

1. Upon the issues made as to the ownership by Hoagland of the note and mortgage: We held in the case of *McCabe v. Reed*, 88 Neb. 457: "If the defendant in an action to cancel a mortgage produces the notes secured thereby, and it appears that he has controlled and had undisputed possession of the instruments for many years under a claim of title thereto, these facts will sustain a finding that he is the owner thereof, notwithstanding they are indorsed payable to the order of a third person." The testimony of the witness Davis we think is not sufficient to overcome that of Hoagland, supported and corroborated as it was by his possession and production of the papers.

2. It is contended that the tax foreclosure proceedings

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were void and conveyed no title to Wilcox. This is really the main contention in the case. The validity of these proceedings is attacked upon a number of grounds. One of these is that the notice for constructive service was not published for the proper length of time. The proof of publication filed with the notice was to the effect that the notice was published in the North Platte Telegraph, a semi-weekly newspaper, for four consecutive weeks; the first publication being made on the 24th day of August, 1900, and the last on the 21st day of September, 1900. Defendant Hoagland called the publisher as a witness, who appeared with the files of the newspaper. His evidence disclosed that there was an error in the date line of at least one issue of the paper; but he testifies, and the files disclosed, that the notice did not appear in the paper published on August 21. If we accept the publisher's testimony, the first publication must have been either upon Friday, the 24th day of August, as the affidavit recites, or on Tuesday, the 28th day of August. Whether we take the first publication as having been upon Friday, the 24th, or Tuesday, the 28th, under the rule announced in *Claypool v. Robb*, ante, p. 193, the notice was not published for the length of time required by the statute, and the court acquired no jurisdiction. The tax foreclosure proceedings, therefore, did not bar the equity of redemption, and the sheriff's deed conveyed no title to the premises.

It is unnecessary to discuss other questions raised as to the affidavit and notice and similar matters affecting the validity of the decree.

It appears that an action had been brought by the holder of the note and mortgage under which defendant claims, and that a decree had been entered thereon. The trial court found that the decree had been "abated and dismissed." This finding was procured by plaintiff, and he cannot now complain of it.

It is contended that this defendant has been guilty of laches whereby he has forfeited his right to insist upon

his note and mortgage. Mere delay in foreclosing a mortgage will not have such effect, and, unless continued for the term prescribed in the statute of limitations, will not bar a recovery.

It is contended that there is another outstanding mortgage against the land, and that defendant is not entitled to relief in this case unless he offers to do equity by paying prior incumbrances. The court will determine what liens exist and their priority. Lienholders are not required to pay prior liens unless they desire to do so to protect their own.

The judgment of the district court is reversed and the cause is remanded for such other and further proceedings as may be required to adjust the rights of the parties.

REVERSED.

ARTHUR G. KRAMER, APPELLEE, V. BANKERS SURETY
COMPANY ET AL., APPELLANTS.

FILED NOVEMBER 28, 1911. No. 16,788.

1. **Venue: ACTION ON BOND: SUMMONS TO ANOTHER COUNTY.** The sureties on a bond given under the provisions of section 6, ch. 50, Comp. St. 1909, are not merely nominal parties in an action on the bond, but have such an interest in the action that an action on the bond may be brought against them in any county where they reside or may be found and, under section 65 of the code, a summons properly issued to any other county for service on their principal.
2. **Judgment: RELIEF IN EQUITY.** Where jurisdiction has attached, the fact that there is an error in the amount of recovery or other irregularities will not justify in a collateral action the granting of an injunction to restrain the enforcement of a judgment.
3. **Subrogation: PRINCIPAL AND SURETY.** In equity, a surety paying a judgment against himself and his principal is entitled to be subrogated to the rights of the judgment creditor, and to have the judgment assigned to him or to some one else for his benefit.

APPEAL from the district court for Otoe county:
HARVEY D. TRAVIS, JUDGE. *Reversed.*

*Pitzer & Hayward, Edwin Zimmerer, D. W. Livingston
and A. G. Ellick, for appellants.*

Andrew P. Moran and John C. Watson, contra.

LETTON, J.

This action was brought to restrain the levy of an execution and the collection of a judgment obtained in the district court for Lancaster county against the plaintiff, Kramer, and others. A demurrer was filed to the petition, which was overruled, and, the defendants electing to stand upon their demurrer, a decree was entered for a perpetual injunction.

The judgment, the execution of which was enjoined, was rendered in a suit brought in the district court for Lancaster county by Laura Thompson and others against Kramer (who is a saloon-keeper at Nebraska City) and two other saloon-keepers, as principal defendants, and three corporations who were sureties upon their several bonds. The action was for damages alleged to have resulted by reason of the sale of liquor to the plaintiff's husband by the defendant saloon-keepers during the years 1907, 1908 and 1909. Service in that action was had upon the corporations by serving the state auditor and a general agent in Lancaster county and on the principal defendants by personal service in Otoe and Douglas counties. Default was made by the principal defendants. The surety corporation defendants entered their voluntary appearance, and a stipulation was entered into between the plaintiff and them, waiving trial by jury, and agreeing that the plaintiff might make proof of her cause of action for damages without a contest, and that judgment be rendered in her favor against the defendants in the sum of \$2,000. It was also stipulated that the judgment be entered in the following proportions:

Kramer v. Bankers Surety Co.

Against Louis W. Prenica, one-seventh; Arthur G. Kramer, three-sevenths; and Frank Effenberger, three-sevenths; and against the sureties, the Bankers Surety Company, of Cleveland, Ohio, three-sevenths; the United States Fidelity and Guaranty Company, of Baltimore, Maryland, three-sevenths; and the Lion Bonding and Surety Company, of Omaha, Nebraska, one-seventh. It further stipulated that the judgment should contain a finding that the corporations named are sureties for the principals, as alleged in the petition, and liable as such for the amount adjudged due, and, further, "that the undersigned will at once pay said judgment and shall be entitled to receive from the plaintiff an assignment thereof or satisfaction, as desired or preferred." Judgment was entered in accordance with this stipulation, and was paid by the corporation defendants.

The petition alleges that on the 30th of November, 1909, a transcript of this judgment was filed in the office of the district clerk of Otoe county, and that on or about December 10, 1909, an execution was issued thereon and placed in the hands of the sheriff of that county which he is threatening to levy. The essential allegations are that the district court for Lancaster county had no jurisdiction of the person of the plaintiff nor of the subject matter of the action; that the individual amount of his liability was not within the issues, and was not adjudicated nor determined, nor was any evidence offered or taken bearing upon this question, and the court had no power to apportion the damages; that the principal defendants were residents of other counties than Lancaster; that neither of the corporation defendants were residents of Lancaster county; that the cause of action did not arise in that county; that the service on the corporations was by serving the auditor of state and the general agents of the corporations for Lancaster county; that the plaintiff did not appear in the action, and did not consent to nor authorize any judgment to be rendered against him; that he has a meritorious defense to the cause of action, in that he was not guilty of

any of the wrongs charged against him; and he further pleads that the judgment has been paid and satisfied; that the plaintiff has no interest nor claim in the same, but that the corporation defendants are causing and directing the sheriff to levy the writ.

1. We will first consider the question of jurisdiction of the person. Plaintiff contends that the service of a summons in a county where a suit is brought upon a nominal defendant merely does not confer authority to issue a summons to another county for a real defendant. Several pages of brief are devoted to arguing this proposition. If the facts brought the case within his premises his conclusion would be unassailable. Unfortunately for this contention this court has already decided that the surety upon a saloon-keeper's bond is not merely "a nominal defendant." In *Horst v. Lewis*, 71 Neb. 365, it is held that licensed liquor dealers and their sureties are jointly and severally liable. In that case the action was brought in Madison county, where two of the defendants and their sureties resided and were served, and a summons was issued to Platte county, where one Smith, another defendant, and his sureties were served. Objection was taken to the jurisdiction of the court over Smith and his bondsmen on the ground that the service was unauthorized, and each of the principals and his sureties separately excepted for misjoinder of causes of action and of parties defendant. The court held that "the attitude of licensed liquor dealers toward each other and the public is analogous to that of mutual guarantors, each for all and all for each;" and, speaking of the sureties, said: "But Smith's sureties are obligated for his entire obedience to the law, and are liable, not only for his several or separate breaches of it, but for such breaches thereof, or liabilities thereunder, as he may have committed or incurred jointly with other licensees under the liquor act. They, therefore, to the same degree as their principal, had an interest in the action adverse to the plaintiffs, were proper parties to the action, and were

properly served in any county in the state to which a summons was issued." *Penney v. Bryant*, 70 Neb. 127; *Wood v. Carter*, 67 Neb. 133. We think the service on the sureties in one county warranted the service on the other defendants in other counties.

2. As to the contentions that the judgment is void because it apportions the liability of plaintiff, that it was rendered without evidence, and that it exceeds the amount of plaintiff's liability, the proceedings were clearly irregular as to the plaintiff in these respects, but these irregularities he was entitled to object to at the trial and to have reviewed on appeal. This was his proper and legal remedy, and one which was entirely adequate. He had no right to remain quiescent, to allow the judgment to go against him, and then to seek to have the errors reviewed collaterally by attempting to enjoin the enforcement of the judgment. The facts in this case differ materially from those in the cases cited by the plaintiff. Moreover, the mere fact that the plaintiff neglected to appear and defend for the reason that he was under the impression that the court had no jurisdiction cannot relieve him from the consequences of his failure to protect his interest. To hold otherwise would be to open the door to endless litigation.

3. Attached to the petition in the present suit as an exhibit is a paper entitled "*Thompson v. Prenica et al.*," certifying that the plaintiff therein has received from the three surety companies (naming them) the sum of \$2,000, and reciting that, "in consideration whereof, I hereby acknowledge full and complete satisfaction of said judgment, and hereby direct that the clerk of the district court of Lancaster county, Nebraska, enter this satisfaction on record in his office in the proper records. (Signed) Laura Thompson, plaintiff."

The remaining question is whether the payment of the judgment by the sureties without taking an assignment of it extinguishes their right to an execution thereon against the principal. The rule in equity is that, where a surety

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pays a judgment on behalf of his principal, the judgment is not thereby extinguished as between the principal and the surety, but the surety is entitled to enforce the same against his principal for his own benefit. The law upon the subject of subrogation has been considered by this court in the case of *Eaton v. Lambert*, 1 Neb. 339; *Wilson v. Burney*, 8 Neb. 39; *Potvin v. Meyers*, 27 Neb. 749; *Henry & Coatsworth Co. v. Halter*, 58 Neb. 685; *Nelson v. Webster*, 72 Neb. 332. In the latter case the surety had paid the judgment, but had taken an assignment of it from the creditor. In a case where an issue has been made as to the relation of principal and surety between the parties, and a judgment establishing such relation has been rendered, does the fact that no assignment of the judgment has been taken by the surety render the payment an absolute extinguishment and satisfaction of the same against his principal? The authorities seem to be almost unanimous that in equity a surety paying a judgment against himself and his principal is entitled to be subrogated to the rights of the original creditor, and to have the judgment assigned to him or to some one else for his benefit. See 37 Cyc. 419, and note, in which cases from many states are collected. This is an action in equity, which regards that as done which ought to be done, hence the greater equities in this matter are with the sureties, and the plaintiff is not entitled to an injunction upon the facts alleged.

We are of opinion that the petition fails to state a cause of action, and that the district court erred in overruling the demurrer to the petition. The judgment of the district court is reversed and the cause remanded.

REVERSED.

**STATE OF NEBRASKA, PLAINTIFF, V. WOODRUFF BALL ET AL.,
- DEFENDANTS.**

FILED NOVEMBER 28, 1911. No. 16,050.

- 1. Public Lands: SCHOOL LANDS: TITLE.** Upon the approval by the federal government of a survey of the interior lines of a township, the state's title to section 36 vests absolutely.
- 2. Boundaries: LOCATION.** Monuments erected by the government surveyor to mark the section corners according to his survey will control, although in conflict with his field notes. If the monuments have been obliterated, but their location can be ascertained from a consideration of the testimony of witnesses who know and testify to the fact, the site thus established will control. If the monuments have been destroyed and their original location cannot be established by other proof, recourse may be had to the field notes of the original survey.
- 3. ———: ———.** Where the monuments which marked corners of the original survey are lost or obliterated and their original location cannot be established by other evidence, and the field notes returned by the government surveyor show that he established an interior section corner on a straight line between the exterior lines of the township and determined its location by courses and distances, the notes are to be accepted as presumptively correct, and can only be overcome by clear and satisfactory evidence that the corner was established at a point other than as thus described.
- 4. ———: ———: EVIDENCE.** Proof that the government surveyor was careless or dishonest in the matter of other surveys, and that he probably made an error of one-half a mile in locating other section corners within the township, will not prevail over his field notes of the particular corner, corroborated by the testimony of one witness who testifies that within two years after the survey he discovered the disputed corner near the point where it should be according to the field notes, and that a corner about a half mile eastward, contended for as the section corner, was also discovered by him, but it bore all of the indications of a government quarter corner.
- 5. Estoppel: SCHOOL LANDS.** Mere delay on the part of the state in asserting title to a disputed tract of school land will not bar its right to quiet title thereto.
- 6. ———: ———.** Nor will the unauthorized acts of taxing officers in levying and collecting taxes upon such lands estop the state

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from asserting its title, even though the sums collected have been appropriated to public use.

7. **Boundaries: EVIDENCE.** The evidence in this case commented upon in the opinion, and held to sustain the state's contention that the land in dispute is part of section 36, in township 30, range 32 west of the sixth P. M., in Cherry county, Nebraska.

ORIGINAL action by the state to quiet title to a certain tract of land. *Decree for plaintiff.*

Grant G. Martin, Attorney General, and Frank E. Edgerton, for plaintiff.

Baxter & Van Dusen, F. M. Tyrrell and F. M. Walcott, contra.

ROOT, J.

This is an original action to quiet in the plaintiff title to about 134 acres of land lying, as alleged, within the northwest quarter of section 36, in township 30 north, range 32 west of the sixth principal meridian, in Cherry county, Nebraska.

The plaintiff alleges that in November, 1882, the United States caused township 30 to be surveyed, and that on May 5, 1883, the surveyor general for the district of Iowa and Nebraska approved a plat of the survey, which had been theretofore filed in his office, whereby it acquired an absolute title to the land.

The defendant admits in his answer that the township was surveyed and the plat of the survey approved, but alleges that the survey was not in fact made according to the plat, but that by mistake the surveyor actually established the monuments of his survey on the ground so as to locate the west line of section 36, 33 chains and 11 links east of the true line of the section had the survey been correctly made; that the defendant filed on part of section 35 according to that survey, and that Mr. W. W. Ault, a government surveyor, under the authority of a special act of the congress of the United States, resurveyed the

township, and confirmed the McElroy survey, so far as it affected the defendant's land; that this survey was also approved by the surveyor general, and subsequently a patent was issued by the United States government to the defendant for this land.

As we understand the arguments of counsel, there is but little difference of opinion concerning the principles of law that should control the case. Independently of the defense of an alleged estoppel of the plaintiff to reclaim this land, should it be held that title ever vested in it, the parties substantially agree that if the "Ball corner," located 45 chains and 48½ links west of the northeast corner of section 36, is the site of the corner established in 1882 by McElroy, the government surveyor, as the northwest corner of the section, we should find for the defendant. We cannot, within the limits of this opinion, refer to all of the evidence upon this point, but something of its substance will be given.

In 1879 the exterior lines of the township were surveyed for the government by S. C. McElroy. In 1882 McElroy surveyed and subdivided the interior lines of the township, and in May, 1883, his plat of the survey was duly approved by the surveyor general. One witness testified that McElroy's field notes recite that he retraced the exterior lines of the township before commencing to survey the interior lines, but we have not discovered any evidence of this fact. Through sections 6, 5, 4, 3, 2, 11, and 12, the Snake river, a stream about four rods in width, runs eastward in a tortuous course, and across the southern tier of the sections the Boardman creek flows eastward approximately in the center of the Boardman marsh, which is about 23 chains wide, but does not extend to either the south line of the township or the northern boundary of the south tier of sections. Between the Boardman marsh and the Snake river the soil is sandy, and is partially covered with bunch grass, soap plants and other vegetation indigenous to the sandhills, but in many places is bare of all vegetation for spaces of from a few

square inches to much larger areas; the surface of the ground is broken by hills and numerous irregular shaped valleys and pockets.

The testimony of Mr. McElroy was not taken, nor does it appear where he resides, if in life. In 1897 a county surveyor, Mr. Tait, surveyed parts of the township, and came to the conclusion that the point where the Ball corner is located was the northwest corner of section 36, and made a plat demonstrating that all of the interior sections of the township were approximately one-half mile too far east. In 1898 Mr. Estabrook, then county surveyor, came to the conclusion that all of the interior corners were a half mile too far west. Subsequently Mr. Estabrook came to the conclusion that the asserted error of the government surveyor should be corrected in the eastern half of the township, and prepared and filed a plat accordingly. Honorable T. J. Howard accompanied Mr. McElroy at the time the interior lines were surveyed, and testifies in substance that the sections were surveyed in tiers north and south across the township, and monuments erected every mile and half mile; that the surveyors could not cross the Boardman marsh, but went around, first erecting a mound on the edge of the marsh, and then another mound on the other side, and the line was controlled by the surveyor in charge of the transit, who, by placing it on the higher elevations and using the back sight, kept the lines true; that the witness observed pits and mounds within the township, evidently constructed by other surveyors, but by whom he does not know.

Mr. Erickson, in 1884, filed on a homestead in the vicinity of the land in dispute, and within a year thereafter surveyed the north line of section 36 and prolonged the line westward for several miles. At this time, according to his testimony, the point now identified as the Ball corner had all of the indicia of a quarter corner—a stake with one pit to the east and another to the west. He also discovered the northwest corner of section 36 near the top of a hill. A small mound and four pits were there

visible; two of the pits were on top and two on the side of the hill, but those on the hillside were then nearly obliterated. This corner, the witness states, was "a long mile" west of the northeast corner of the section. He also testifies that he discovered government corners to the westward, with pits, mounds and marked stakes. This witness assisted Mr. Tait in making the survey which first recognized the corner, identified by the witness as the quarter corner, as the northwest corner of the section; a mound was raised and pits were dug by the chainman, under Tait's directions. No witness testifies that prior to this time there was any physical evidence that a government section corner had been located at this point. After this controversy arose, the earth was carefully removed for 10 feet in all directions from the stake and to a depth of several inches, and no evidence was obtained to prove that four pits had been dug in the soil. The outlines of a pit about two feet square were observed, but the area and location of this pit refute the conclusion that it could have been constructed by McElroy or by any other government surveyor. Erickson positively identifies this corner as a quarter corner. To accept the conclusion that it is the site of the northwest corner of the section as located by McElroy, we must reject Erickson's testimony, and accept, first, the conclusion that several of the McElroy corners have been located, and, second, that they are a half mile distant from the point where they should have been, and then conclude that this error was uniform throughout the survey of the interior of the township, and in consequence the Ball corner must have been the northwest corner of the section as located by Mr. McElroy.

In 1907 Harvey, the state surveyor, after removing the surface of the soil at a point approximately a mile west of the Ball corner, discovered the outlines of four pits so situated with respect to each other as to indicate that they were dug by a government surveyor, or by some person desiring to imitate the work of a government surveyor; one-half mile further westward the remains of a

red cedar stake was found, but no pits were discovered or other evidence found that pits had been dug; one-half mile further westward the outlines of four pits and an old red cedar stake were found; one-half mile further westward slivers of a red cedar stake were found and the outlines of two pits east and west; one mile further westward the remains of an old red cedar stake and two pits were found; about four miles northward from the point a mile west of the Ball corner, Mr. Ault, a deputy government surveyor, subsequently found what he contends is a government corner. At this point the outlines of four pits were visible and an iron rod protruded from the ground. This point is within a few chains of the corner common to sections 2, 3, 10, and 11 and to a bend in the Snake river, according to the calls in McElroy's field notes. This stream flows where it did in 1882, and, if this corner be accepted as a McElroy corner, it tends strongly to sustain an argument that it was located upon the ground a half mile east of the point where it should have been established. There is also evidence to the effect that, in 1886, a county surveyor, DeBerry, found government corners intact in the southwest part of the township, with stakes marked to indicate the section, town and range, and that settlers locating their claims according to his surveys located a half mile east of the true lines according to McElroy's field notes. There is also testimony of old settlers in the township to the effect that points in the interior of the township contended for by the defendant as government corners, but west of section 36, were such corners, and that they are a half mile east of the points described in McElroy's field notes. On the other hand, a diligent search did not disclose any section corners or evidence of section corners to the north and in line with the Ball corner; no one contends any such corners were ever seen. McElroy's field notes of the survey of the west line of section 36 corresponds closely with the field notes of that line run 18 years thereafter by Ault, and by Sweitzer 7 years after Ault's survey. In

all of these surveys the calls for the Boardman marsh and the Boardman creek create a strong probability that the lines were actually traced by McElroy along the western boundary of the section.

Mr. Sweitzer, government expert, and witness for the state, testifies that in his opinion McElroy did not locate the northwest corner of section 36, but the point where the witness plowed up and removed the surface of the soil, and where he says the McElroy field notes call for the corner, is on a sidehill. Mr. Erickson testifies that the section corner discovered by him was on a sidehill, and it is not unreasonable to believe that, during the 15 years intervening between the McElroy survey and Tait's survey, the action of the wind and the rain beating upon this hillside and the tramping of cattle have obliterated all the pits, so that even an expert might believe, after a careful investigation, that none were dug. The fact that McElroy erroneously located some of the interior section corners in another range of sections does not necessarily nor logically prove that the corner under consideration was erroneously located.

If the monuments erected by the government surveyor have been obliterated, and no witness can fix their original location, and the government surveyor's field notes returned to the surveyor general show that section lines were established on straight lines between the township corners and determine their location by courses and distances, the notes should be accepted as presumptively correct, and should only be overcome by clear and satisfactory evidence that the surveyor established the corners at other points. *Resurrection Gold Mining Co. v. Fortune Gold Mining Co.*, 64 C. C. A. 180; *Hanson v. Township of Red Rock*, 4 S. Dak. 358; *Taylor v. Fomby*, 116 Ala. 621. Furthermore, the map returned and approved by the surveyor general gives the area of section 36 as over 638 acres; whereas, if the defendant's theory be accepted, the area will be diminished over 120 acres. In case of doubt or confusion, the quantity actually named in the

grant is entitled to some consideration. *Ely's Administrator v. United States*, 171 U. S. 220. The map, therefore, should be considered in connection with the field notes in fixing the quantity of land segregated as section 36. The line from the northeast corner of section 36 westward to the northwest corner of section 31 is 476.78 chains in length. There is nothing in the record to advise us that the deficiency of 3.22 chains was not allotted by Mr. McElroy to section 30, as the law provides. We do not feel like accepting any alleged corner on that line as the interior corner of any section west of section 36, so that the doctrine of proportionate measurements is not involved, and we feel at liberty to give to the government field notes such credence as we think proper.

From all of the evidence before us, we find that whatever mistake McElroy may have made in locating the interior section corners in township 30, the proof does not show that he made a mistake in locating the northwest corner of section 36; that the field notes returned to and approved by the surveyor general and the plat prepared by him, when considered in connection with the testimony of the witnesses, sustain the allegations in the petition, and require a decree in the plaintiff's favor, unless it is estopped to maintain this action.

We have not discovered any evidence tending to prove that the state induced the defendant to occupy any part of section 36. Before filing on section 35, but taking possession of part of 36, the defendant advised with his lawyer, went to the premises in company with Mr. Taft, and accepted his statement that the Ball corner was the northwest corner of 36. The defendant knew, or should have known, that no part of any deficiency of area in the township would be taken from this section if it were properly surveyed. The northeast, the southeast and the southwest corners of the section are visible in the township lines, and the field notes of Mr. McElroy's survey were of record. Mr. Ball made no inquiry of the commissioner of public lands and buildings, nor did he interview

the state's tenant, who was asserting a right to all of the section, and actually using the hay cut and cured on part of the disputed territory. There is no proof of facts sufficient to create an estoppel between individuals, much less against the sovereign state.

After the United States government issued a patent to the defendant for section 43 (the description given by surveyor Ault for the disputed territory) the taxing officers of Cherry county levied taxes thereon for state, school district and county purposes, and the defendant paid the taxes. These facts the defendant contends estop the state from asserting title to the real estate, and *People v. Hagadorn*, 104 N. Y. 516, is cited by him to sustain his contention. That case was controlled by a finding that a comptroller's deed to the state for lands sold for taxes, which were in part invalid, was void. In answer to an argument that the state might ignore the deed and assert title as the original proprietor, it is said that if the deed were void, the state having assumed to sell the land as the property of a citizen to satisfy his taxes, was precluded from asserting title as the original proprietor.

In this case the state has not sold or attempted to sell the land, nor does the defendant claim under it. The taxing officers are not vested with discretion to tax or refrain from taxing property within their respective jurisdictions. If they fail to levy taxes upon land subject to taxation, the levy may subsequently be made; if they levy taxes upon land not subject to taxation, the levy is void. They are not vested by law with power to perform any act which will estop the state from asserting title to the school lands, which it holds in trust for the benefit of all of the school children within its boundaries. This subject has been discussed and determined adversely to the defendant's contention in the following cases: *Crane v. Reeder*, 25 Mich. 303, 320; *Howard County v. Bullis*, 49 Ia. 519; *Reid v. State*, 74 Ind. 252; *State v. Portsmouth Savings Bank*, 106 Ind. 435.

Upon a consideration of the entire record, we find generally for the plaintiff.

DECREE ACCORDINGLY.

FAWCETT, J., dissenting.

While I have been unable to reach the same conclusion as that reached by my associates *in re* the so-called "beer bottle" corner, I pass that point without discussion. The defense of estoppel, however, based upon the laches of the plaintiff, is in my judgment so clearly established that I cannot permit the majority opinion to go down without expressing my views upon that point.

From quite an early date, the corners of section 36 have been uncertain and the correctness of the original survey has been questioned in the neighborhood. Resurveys made by the government failed to relieve the situation of its uncertainty. The question as to whether or not the corners, as established by the original survey, were found by the surveyors making the resurveys is so uncertain that the boundary line between the lands of plaintiff and defendant has never been satisfactorily settled. As a result of the survey and resurveys, section 43 was established, and a patent issued to defendant in 1904 for the land in controversy, which he had entered in 1898. It appears from the undisputed evidence that when defendant made his homestead entry in 1898 he took possession of the land up to the boundary line as he understood and claimed it to be; that he continued in such possession for the full period of five years required by the homestead laws, and in 1904 received from the United States government a patent for the land of which he had been in possession for the prior five years, and which land is the land in controversy. As soon as the patent was issued to him, the land was, by the regular taxing officers of the state, assessed and taxed in his name as owner, and continued to be so assessed and taxed down to the commencement of the present suit. Such taxes were regularly paid by defendant. It appears, therefore, without dispute, that the defendant had been in posses-

sion of the land in controversy, under claim of ownership, for eleven years prior to the commencement of this suit, with full knowledge on the part of the state of his possession and claim of ownership under his homestead entry in 1898 and patent of 1904, and with the further knowledge on the part of the state that the land had, since 1904, been assessed and taxed to defendant as "section 43"; that he had regularly paid his taxes so levied, and that such taxes were annually accepted and used by the state. With knowledge of all of these facts, no attempt was ever made by the state to dispossess defendant of this land until it instituted the present suit in 1909. The mere fact that a lessee of the state may have questioned defendant's right to a portion of the land claimed by him, and one year hauled off and stacked some hay which defendant had cut thereon, cannot, in my judgment, in any manner operate to the advantage of the state, or be construed as an assertion by it of its right to the land claimed by and in the possession of defendant. Nor should the fact that defendant permitted the taking of his hay by such lessee, and thereby possibly avoided litigation over something that was probably of little value, be taken as any relinquishment by defendant of his claim. Nor is it material that, if defendant succeeds in holding the land, section 36 may be "short." The land obtained by the state under its grant from the government was "section 36," as shown by the first approved government survey, and was limited to the number of acres which it actually contained, whether that number were 640 acres or a less quantity. That the government did not at the time regard the land in controversy as a part of section 36 is evidenced by the fact of its establishment of section 43 and the issuance to defendant of a patent therefor. While I freely concede that, as against the state in the exercise of any of its governmental functions, there can be no estoppel, I am unable to see why, in a suit in equity or an action at law for the enforcement or protection of a mere property right, the state is not as

much subject to the doctrine of estoppel as is any other litigant. The authorities so hold. *State v. Lincoln Street R. Co.*, 80 Neb. 333; *United States v. Stinson*, 125 Fed. 907; *United States v. Chandler-Dunbar Water Power Co.*, 152 Fed. 25; *Walker v. United States*, 139 Fed. 409; *Bullis v. Noble*, 36 Ia. 618; *City of Peoria v. Central Nat. Bank*, 224 Ill. 43; *United States v. Willamette Valley & C. M. Wagon Road Co.*, 55 Fed. 711; *Cooley*, Constitutional Limitations (5th ed.) *254; *State v. Flint & P. M. R. Co.*, 89 Mich. 481; *Simplot v. City of Dubuque*, 49 Ia. 630. And this, too, without reference to the statute of limitations. *State v. City of Des Moines*, 96 Ia. 521.

It is urged by the attorney general that defendant knew that the state was leasing "this land" to Rowley and Bachelor, and that the public records at Lincoln and in Cherry county showed it. I do not think so. What those records showed, and what defendant would thereby be bound to know, was that the state had leased to those gentlemen "section 36"; but those records would not advise him that the state was claiming that *his land* was in section 36. He certainly would have no reason to think so from those records, when he had in his possession a patent from the United States government which showed that the land he claimed was in section 43.

How long would a similar case stand if the plaintiff were an individual or a private corporation, instead of the state? To illustrate: Smith owns a large tract of land. He donates a portion of it to an irrigation company incorporated under the laws of the state. The company digs its ditches, and has the water flowing therein, through not only the land which it receives from Smith, but also through adjoining lands which still belong to Smith. Subsequently Smith sells the adjoining land to Jones on a five-year contract, which provides, as a condition for Jones' obtaining a deed from Smith, that Jones must pay Smith \$14 (the amount which defendant paid for his homestead), and actually reside upon the land for the five years specified in the contract. There is a

dispute as to the boundary line between the land donated to the irrigation company and that conveyed to Jones. Jones immediately takes possession of the land up to the boundary line as he claims it to be. He retains such occupancy of, and maintains his residence upon, the land for the full period of the five years specified in his contract with Smith. Smith thereupon executes and delivers to him a warranty deed for the land. The irrigation company immediately demands of Jones that he pay to the irrigation company a dollar a year for the upkeep of the ditch which goes through the land he is claiming to own. Jones pays the dollar a year to the irrigation company each year for five years thereafter. During all of this period of more than ten years that Jones has been in possession, the irrigation company takes no steps to dispossess him of that portion of the land which it claims is within the limits of its grant from Smith, but after the lapse of those years it brings a suit against Jones to quiet its title to and for the possession of the land in dispute. How long would the case of the irrigation company last in this court? Just long enough for us to write a short opinion dismissing its suit upon the ground that by its own gross laches it is estopped to question either the title or right of possession of Jones. The case thus outlined is in all respects a twin brother of the case decided in the majority opinion.

In *United States v. Chandler-Dunbar Water Power Co.*, *supra* (p. 40) it is said: "Following the ancient common law maxim '*nullum tempus occurrit regi*,' it has been settled as the rule here that the United States is not affected in respect to its pursuit of remedies by mere delay or general statutes of limitation. But, when it sues in equity as a private suitor on a cause of action relating to its proprietary interests, it is held to be affected by those equities which are recognized as fundamental in controversies between private parties."

To my mind it would be an act of injustice to take this land from the defendant and give it to the state. If the

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state had been prompt in the assertion of its claim in 1898, when defendant entered the land and took possession of it, and had then ousted him, he could have obtained other land by homestead entry, or have purchased the same at a price far less than that at which he could possibly obtain it now, and could have devoted his 13 years of energy and labor to the improvement of the same. I cannot give my consent to such confiscation on the part of the state.

REESE, C. J., concurs in this dissent.

WILLIAM R. BENNETT ET AL., APPELLEES, v. JAMES E.
BAUM ET AL., APPELLANTS.

FILED NOVEMBER 28, 1911. No. 16,484.

1. **Appeal: PLEADING: MOTION TO MAKE DEFINITE.** An order of the district court requiring defendants to make their answer more definite and certain will ordinarily be sustained, unless it clearly appears that thereby the court abused its discretion to the defendants' prejudice.
2. **Exceptions, Bill of: SETTLEMENT BY REFEREE.** A referee has sole authority to settle and allow a bill of exceptions of the evidence adduced during the trial before him.
3. **Reference: POWER OF COURT.** Section 299 of the code, among other things, authorizes the district court without the consent of the parties to refer issues of fact or of law in equitable actions where it becomes necessary to examine mutual accounts, or where the account is on one side and it is necessary to examine the party to that side to prove the account, or where the taking of an account is necessary for the information of the court before judgment.
4. **—: PROCEDURE.** And in such a case it is not jurisdictional that the court shall first enter an interlocutory order that either party is entitled to an accounting.
5. **Corporations: INCREASE OF STOCK: RIGHTS OF STOCKHOLDERS.** The power of a corporation to increase its capital stock is held by it in trust for its stockholders and should be exercised so that every

stockholder may, within a reasonable time after notice of such increase, subscribe for the increased issue in proportion to his prior holding.

6. ———: **SUITS BETWEEN STOCKHOLDERS: EQUITABLE RELIEF.** Where all of the stockholders of a corporation and the corporation are before a court of general jurisdiction in an equitable action involving the rights of the stockholders in the corporation, the law looks to substance rather than to form, and, if the rights of third persons will not be prejudiced thereby, and the pleadings and evidence justify, will apply the rules of equitable estoppel to prevent one stockholder from doing an injustice to another.
7. **Contracts: CONSIDERATION.** All of the parts of the transaction will be considered to ascertain whether a consideration sustains a contract.
8. **Corporations: REINCORPORATION: ESTOPPEL.** Where, after A agrees, upon a lawful and sufficient consideration, to organize a corporation, transfer to it definitely described chattels and real estate, and give to B one-fifth part of its capital stock, the attempted incorporation is found to be invalid, or A believes it to be invalid and reincorporates, transferring to the subsequent corporation all of the property held by the first, and B with knowledge of the fact exchanges stock issued by the simulated for that of the second corporation and retains it for two years without question or objection, and A changes his position in reliance upon the validity of the latter corporation, B is estopped from asserting that the first one is legal and the subsequent one illegal.
9. **Judgment: PLEADING AND PROOF.** Unless the allegations and the proofs agree, or the record discloses that the litigants tried an issue as though it were joined by the pleadings, so much of a decree as does not respond to the admissions in or issues joined by the pleadings cannot be sustained.
10. **Appeal: AMENDMENT TO CONFORM TO PROOF.** Where it is clear that all of the evidence to sustain or defeat an issue was adduced by the respective litigants in an equitable action in the district court, it is competent on an appeal for this court in the interests of justice to permit amended pleadings to be filed so as to conform to that proof.
11. **Reference: ALLOWANCE TO REFEREE.** In an action involving an accounting of the business affairs of a corporation which for four years transacted an annual business of about \$2,000,000, and owned net assets of the value of \$572,392, where a lawyer of great experience and high standing at the bar acts as referee and the hearing continues eight months, a fee of \$7,500, allowed by the

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district court upon undisputed evidence that the services were worth \$10,000, will not be reduced on appeal.

12. **Costs.** And in such an action, where the plaintiffs are given partial but substantial relief, and it appears just that the costs should have had been taxed in the district court against the corporation in whose name the title to the property over which the parties are contending is vested, an order to that effect will not be disturbed on appeal.

'APPEAL from the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Judgment modified.*

John J. Sullivan and Baldrige, De Bord & Fradenburg,
for appellants.

John F. Stout, E. C. Strode and W. S. Summers,
contra.

Root, J.

This is an action in equity to compel the defendants Baum to account for the property and profits of a corporation, to declare dividends upon the plaintiffs' stock, for the appointment of a receiver, and for equitable relief. The plaintiffs prevailed in part, and the defendants appeal.

In making up the issues, the district court sustained plaintiffs' motion to make the answer more definite and certain. In this we think no substantial injury was inflicted upon the defendants, and shall give the subject no further consideration.

After the issues were joined, the court, upon the plaintiffs' motion, appointed William Baird, Esquire, a reputable, experienced member of the bar, as a referee to take testimony and to report to the court findings of fact and conclusions of law. This was done. The defendants' exceptions to parts of the report were overruled by the district court and the report was confirmed.

The plaintiffs move to quash the bill of exceptions because it was settled and allowed by the referee, and not

by the judge. It is evident that all of the evidence was introduced before the referee, and that the district court acted solely upon the report of that officer. The referee should settle the bill. Code, sec. 303. The plaintiffs' contention has been repeatedly raised and uniformly overruled in other cases in the same plight as the instant one, and the question should no longer be considered subject to discussion. *Light v. Kennard*, 10 Neb. 330; *Turner v. Turner*, 12 Neb. 161; *State v. Gaslin*, 30 Neb. 651; *Whalen v. Brennan*, 34 Neb. 129; *Carlson v. Beckman*, 35 Neb. 392; *Disbrow & Co. v. McNish*, 52 Neb. 309. The motion is overruled. The other questions of law grow out of the facts, which we shall state and comment upon as concisely as the record will justify. The referee made elaborate findings of fact, many of which are not challenged by the defendants, yet for a proper understanding of the case some of them should be referred to in this opinion.

For 23 years prior to 1901 Samuel F. Bennett and his associates, either as partners or the members of a corporation, were engaged in a profitable retail mercantile business on Capital avenue in the city of Omaha. The business had been advertised consistently and extensively, and the corporation was well and favorably known to its customers. In the spring of 1901 the W. R. Bennett Building Company, a corporation controlled by W. R. Bennett and S. F. Bennett, purchased lots 1 and 2 and the east two-thirds of lot 3, all in block 146 in the city of Omaha, and lot 5 in that block. Upon the first described tract, which is located at the corner of Sixteenth and Harney streets, a substantial five-story building was constructed and prepared for a department store; on the last described lot a barn was built. The W. R. Bennett Company, a corporation which controlled the mercantile establishment on Capital avenue, moved its merchandise into the new building at Sixteenth and Harney streets, and transacted business therein until December, 1902, or January, 1903. During these months, the exact date being immaterial, the W. R. Bennett Company was duly de-

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clared a bankrupt by a judgment of the district court of the United States for the district of Nebraska. Either W. R. Bennett or S. F. Bennett, or both of them, interested J. E. Baum and D. A. Baum, wealthy ironmasters of Omaha, in the Bennett business to the extent that the Baums agreed to try and effect a composition with the Bennett creditors so that the business might continue; but these negotiations failed. At the time this cause was tried S. F. Bennett had departed this life. The evidence is not clear concerning the negotiations leading up to the execution of the contract upon which the plaintiffs rest their case. Probably the fact that the agreement is in writing influenced counsel to adopt the theory that inquiry should proceed from the date of its execution. However, there is sufficient evidence to justify the conclusion that Mr. S. F. Bennett, who was also adjudged a bankrupt, desired to save something from the wreck of his fortune, and that he believed the business could be profitably continued by the Baums in company with himself. At any rate, the Baums purchased at trustee's sale for about \$80,000 all of the assets of the W. R. Bennett Company, including a stock of merchandise which invoiced at \$140,000, and demands against the W. R. Bennett Building Company aggregating \$184,000, of which \$84,000 was evidenced by an open account, the balance by promissory notes. This sale was confirmed by the court during the forenoon of February 23, 1903, and immediately thereafter a special meeting of the stockholders of the W. R. Bennett Building Company was held in the office of its counsel, all of the stockholders being present in person or by proxy, and the directors were then authorized to transfer all of its assets, which consisted exclusively of real estate, to the defendant J. E. Baum for the alleged consideration that the Baums should cancel the \$84,000 book account purchased by them. The deed was thereupon executed and the account canceled. About 6 o'clock P. M. of that day J. E. Baum signed and delivered to S. F. Bennett the following writing: "To S. F. Bennett, N.

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E. Bennett, Jennie S. Brown and Mary L. Wade: In consideration of the transfer to the undersigned of all the real estate of the W. R. Bennett Building Company, I hereby agree to form a corporation and transfer to it all of the property rights, assets and claims of every kind and nature of the W. R. Bennett Company which I have acquired by purchase at trustee's sale in bankruptcy proceedings, and of the W. R. Bennett Building Company which I have acquired by conveyance from the said company in exchange for the entire issue of the corporate stock of the new corporation to be formed; and that upon the said stock being issued to me, I will transfer to you the one-fifth part of all the said issue of said corporate stock of the new corporation; the said shares to be issued to you jointly or severally in such proportion as you may in writing designate. J. E. Baum." During the evening of that day, or of some other day in close proximity thereto, the evidence being contradictory as to the precise date, the Baums, the Bennetts and Dr. Brown of Lincoln, husband of Jennie S. Brown, discussed the position that the Bennetts should occupy in the new corporation and the salaries to be paid them. After considerable negotiations, it was agreed that S. F. Bennett should be paid \$100 a month, and W. R. Bennett should receive \$3,000 per annum and should be the manager of the departments. The term of his employment was not named. W. R. Bennett prepared a written memorandum which he produced at that meeting. It is as follows:

"REORGANIZATION.

Name.—The Bennett Co.

Composed of J. E. Baum, D. A. Baum, W. R. B.

" "

Life of corporation.

Capital Stock (Com.)

Made up of—

One-fifth (1-5) of total capital, to W. R. B., or order
fully paid—

Additional Stock issued.

Privilege to W. R. B. or associates to buy 1-5 of new stock
& pay for same in cash or note.

No stock to be sold without first giving present stock-
holders opportunity to buy—

Position W. R. B. to hold

Salary “ “ have

Length of contract, etc.

Position of S. F. B.

Salary “ “

Length of position

Release of lot 5, Reed's 2d to C. S. Bennett estate

Consideration being equity, name, & good will.”

The Baums testify that this memorandum, which was not signed, was produced at a meeting held before the contract was made. W. R. Bennett testifies the meeting was held the night of the day the contract was signed. We do not consider the date material, but incline to the view that the memorandum casts some light upon a subject which we shall subsequently discuss. The first of April, 1903, the Baums opened the department store, and thenceforward until the month of October, 1903, continued the business under the name of the Bennett Company. During this month the Baums incorporated, or sought to incorporate, two corporations, under the laws of Delaware. One, under the name of the Bennett Company, had an authorized capital of \$80,000, and no provision was made in the articles for amendments. The certificates of stock were not issued until March, 1904. The property purchased at trustee's sale, less so much as had been sold and plus all increments, was transferred to the Bennett Company in consideration for its capital stock, of which one-fifth part was issued to R. S. Hall, as trustee for the Bennetts. We have discovered no evidence to instruct us concerning the nature of this trust. The other corporation was described as the Baum Building & Realty Company. Its capital stock is \$20,000, and 40 shares were issued to Mr. Hall, as trustee. The legal

title to the real estate conveyed by the W. R. Bennett Building Company to Mr. Baum was not transferred to the corporation; but a written proposition made by him to it that he would transfer title to the real estate in consideration for all of its capital stock was accepted. Mr. Baum testifies that he retained the title because a debt secured by mortgage on the property having matured, he could not secure a new loan at a reasonable rate of interest in the corporate name, but was compelled to sign the notes and therefore retained title as indemnity should he be compelled to pay any part of the debt.

S. F. Bennett and his associates did not control sufficient capital to stock all of the departments in the store, so they leased many of them to individuals. The Baums, as rapidly as these leases expired and conditions were favorable, purchased in the name of the Bennett Company merchandise and stocked these departments. The Baums reorganized the scheme of business, financial and otherwise, economized in many ways, and increased the gross sales and the net profits so that in 1907, when this suit was commenced, they employed 14 buyers and from 400 to 500 clerks, and the gross annual sales of the combined departments exceeded \$2,000,000, upon which a considerable profit was made. The Baums enjoyed high credit and borrowed large sums of money which were used to extend and carry on the business of the Bennett Company. At the same time, they operated the Baum Iron Works and the New Paddock-Hawley Company, corporations owning and controlling valuable properties, and engaged in great business enterprises. The Baums, with the exception of a Mr. Virden, who resided in Delaware and held but one share of stock, were the sole directors and controlled the corporate affairs of the Bennett Company and of the Baum Building & Realty Company as absolutely as though they individually owned all of the assets of those corporations. The Baums maintained no private bank accounts, but all of their bills were paid by the Bennett Company, and their

private funds were deposited in the Bennett Company bank account. Likewise they paid for private investments by checking on that account, but their personal accounts in the books of the Bennett Company were charged for the money thus paid. They also purchased two valuable tracts of Omaha real estate, taking the title in the name of one of the Baums, and paying therefor out of the Bennett Company funds. The entries in the Bennett Company's books tend to prove that the corporation is the beneficial owner of this property. They also carried on the books of the Bennett Company accounts with the several corporations controlled by them. At times these corporations would be creditors of the Bennett Company and at times were its debtors. That is to say, the credits of the several corporations would be massed for the benefit of one at times when that credit was most needed by the debtor company, and at times the Baums individually profited by temporary credits on the books of the Bennett Company. On the other hand, the Bennett Company was indebted at times in large sums to the Baums, and to their several corporations. In the summer of 1904 the Baums submitted to their counsel, Mr. Charlton, the articles of incorporation of the Bennett Company and of the Baum Building & Realty Company, and were advised by him that the incorporations were so defective that it was not safe to continue transacting business in this manner. Whereupon two corporations were formed with names identical with those of the original corporations, or simulated corporations, but the capital stock of the Bennett Company was fixed at \$200,000 instead of \$80,000, and the amount of capital stock of the Baum Building & Realty Company was also increased. The stock of each corporation was divided into common and preferred. All of the stock of the old corporations was called in and exchanged for an equal amount of the new corporations' common stock. There then remained \$120,000 of stock of the Bennett Company, one-half of

which was treated as treasury stock, and the remainder was not issued. We do not consider further consideration of the Building Company stock material, and will devote our attention to that of the Bennett Company.

On August 8, 1905, the directors of the Bennett Company by resolution ordered that \$40,000 of preferred and \$20,000 of common stock of the Bennett Company should be issued and sold at par, plus 6 per cent. annual interest from January, 1904, and the stockholders were given until August 19 in which to subscribe therefor. August 14 written notice was sent to those interested in the Bennett stock and to the trustee that they had until the 19th of the month to subscribe for their *pro rata* share of this stock. They did not subscribe, and the 600 shares were issued, one-half to J. E. Baum and the other half to D. A. Baum. We are of opinion that the plaintiffs from any standpoint have cause for complaint concerning this conduct of the Baums in giving them so short a time within which to subscribe and pay for this stock. *Jones v. Morrison*, 31 Minn. 140. Moreover, there is evidence tending strongly to prove that the Baums issued all of the stock to themselves before the 19th of August. No attempt was made to ascertain the net worth of the corporation at this time, or to offer for sale or to sell the additional stock at the premium it should bear in order that its contribution might equal the value of property represented by the \$80,000 original stock. In April, 1903, the \$80,000 purchased not only \$140,000 worth of merchandise, but the equity in the real estate formerly owned by the W. R. Bennett Building Company. The proof shows that this real estate increased rapidly in value in the meantime, and that the affairs of the Bennett Company had been prosperous, so that the stock should have been worth, and in all probability was worth, much more than par. By acquiring this stock at a trifle above par, the Baums, controlling directors of the corporation, participated in the surplus which should have been credited to the \$80,000 and depreciated the

value of all of the stock held by Hall, trustee. The referee was therefore right in finding that this issue of stock should be canceled. *Jones v. Morrison, supra.*

Although the Baums subscribed for this stock, they paid no money therefor, but it was charged to their account. Subsequently the certificates were canceled and new ones in like amounts issued to the Baum Iron Company and to the New Paddock-Hawley Company. The defendants Baum contend that, since those transferees are not parties to this action, the decree directing the cancelation of this stock is void and should not be sustained. Those corporations are not parties to this record, but the evidence is uncontradicted that the Baums control them and own practically all of their capital stock. The Baums will have no trouble in satisfying any demands that may be made by the other stockholders of those corporations for any profits lost by the cancelation of this stock. The referee, with the assistance of the expert accountants, made findings which cover the state of the accounts between the Bennett Company, on the one hand, and the Baums and their various corporations, on the other. The referee found that there were errors in the accounts in the books of the Bennett Company and corrected them. We do not understand that the experts and counsel for the respective litigants dispute the conclusions of the referee upon this phase of the case, and further consideration will not be given thereto.

It is urged that no account should have been taken, because the books were open for the plaintiffs' inspection, that the Baums were willing to submit a detailed statement of the condition of the corporation's business, that none of the allegations of fraud charged against the defendants were found true, and because no interlocutory order was made that the plaintiffs were entitled to an accounting. Upon the last point the arguments made and the authorities cited would be more relevant in a jurisdiction where the ancient action of account is

recognized and its procedure adhered to; but in Nebraska section 299 of the code authorizes a reference without the consent of the parties in equitable actions where the trial of an issue of fact requires the examination of mutual accounts, where an account on one side must be considered in connection with the testimony of the party to that side, or where the taking of an account is necessary for the information of the court before judgment. The code does not require an interlocutory order that either litigant is entitled to an accounting with the other, as a condition precedent to the reference. The code was enacted to simplify legal procedure and eliminate unnecessary ceremony. Doubtless, if the litigants do not admit a state of facts entitling one or the other to an account, the court might properly try the issues until it appeared from the evidence that an accounting was necessary and then make its order, but such a course is not necessary in every case. In the instant one the defendants were in control as directors of a corporation owning great quantities of personal property and transacting a vast business. Owning 80 per cent. of the capital stock, the Baums could not be ousted from complete control. They had not called or held a stockholders' meeting for years, and in effect refused to inform the plaintiffs, minority stockholders, concerning the condition of the corporation's property and its business affairs. The entries in the corporation's books of account were such that no one other than an expert, aided by an inspection of documents independent of the books and in the defendants' possession, could ascertain the condition of the corporation's business, and the defendants refused to permit the plaintiffs to put an expert at work on the books. Although the defendants at no time absolutely refused to give the plaintiffs a statement of the condition of the corporation's business and property, they did not furnish it. Frequently importuned, they promised, but did not perform, although a monthly trial balance was taken and semiannually a complete inven-

tory of all the assets of the corporation was made. There is some conflict in the testimony concerning what was said and agreed to at the last conference at Mr. Baum's house a few weeks preceding the commencement of the action, and the plaintiffs are charged with bad faith in not abiding by the alleged agreement of their counsel. We are satisfied that Mr. W. R. Bennett was angry at the Baums because he had been supplanted by Mr. Schantz, and that he may be responsible in a way for the commencement of this action. We are also satisfied that the Baums were not preparing the statement, but were pursuing their wonted course. The real estate which Baum agreed to transfer to the corporation was valued on the books of the Bennett Company at \$79,291.17, whereas the referee found that in December, 1907, the net value was \$340,823. There were errors in the entries in the books aggregating about \$150,000, not false entries, but erroneous ones, some of which balanced other errors of like amount. Not all of the accounts were self-explanatory. In short, the condition of the books was such that it was absolutely necessary to interrogate the Baums with regard thereto in order that the district court might enter a judgment which would do justice to all of the parties. We therefore conclude that no error was committed in referring the case.

Complaint is made that the trial was unduly prolonged, whereby great expense was incurred, which should be taxed to the plaintiffs instead of to the Bennett Company. Considerable evidence adduced might have been omitted without depriving the court of knowledge of all of the material facts; many of counsels' suggestions and some of the referee's remarks, all of which are recorded, might have been eliminated without prejudice to the rights of either litigant. The parties seem to have been unduly suspicious of each other and aggressively active in attempting to exclude evidence. As it is, all of the corporation's transactions were minutely examined, and much testimony was given to explain

the entries in the books. We are not inclined to disturb the taxation of costs entered by the district court.

Nor do we consider the referee's fee unduly extravagant. The referee devoted about eight months to the taking of testimony and several other months to a consideration of the evidence. The referee's affidavit that \$10,000 is a reasonable fee for his services is not controverted by any evidence, written or oral, so that the allowance of \$7,500 will not be disturbed by us.

As we understand the record and arguments, the Baums' most serious contentions are that the district court erred in adopting the referee's recommendation that the corporation organized in the summer of 1904 is illegal and its capital stock should be canceled; that the first incorporation, or attempted incorporation, in 1903 is legal and should control, and in enjoining an increase of its capital stock. To us it seems immaterial whether or not the first corporation was legally organized. Practically all of the stock of these corporations is held or controlled by the plaintiffs and by whomsoever succeeded to the interests of Richard Hall, as trustee, on the one side, and by the defendants Baum, on the other. The litigants are in a court of equity, which looks to substance rather than to form. We incline in part to the view of the defendants' counsel that the plaintiffs and their trustee by long acquiescence in the validity of the second corporation ratified the reincorporation. Mr. Hall testifies that, when requested by the Baums to exchange the stock first issued for that of the second corporation, he consulted with Mr. Bennett, and it was agreed that the exchange should be made on the theory that the first incorporation was defective. No objections were raised and no attack was made upon the validity of the second incorporation until at least subsequent to the commencement of taking testimony in this case. In fact, we find no allegation in the petition to sustain the charges made in the briefs, or the findings of the referee that the second incorporation is invalid

and an attempted amendment of the original incorporation. Assuming that the litigants by the introduction of evidence have imported these subjects into the issues, we do not hesitate to say that the plaintiffs are estopped at this late day to insist that the first incorporation was valid, and the second one invalid, because its articles are amendatory of the former and the articles first adopted do not provide for amendments. It was certainly understood by all of the parties in interest that the first articles of incorporation and the corporation itself should be abandoned and the second articles accepted in substitution of the former. We do not assume to say that the state of Delaware may not by proper action dissolve the second corporation; but we do say that, the parties in interest other than that state being before us, we will apply the well-known rules of equitable estoppel to prevent one litigant from working an injustice to the other. It follows, however, that if, as the defendants argue, the second corporation, whether original or amendatory of the first, was the first compliance with the Baums' agreement to form a corporation, they should transfer to the Bennetts one-fifth part of its capital stock, and the plaintiffs should be permitted to amend their petition so as to sustain a decree for a specific performance of the contract. In that event, the Baums should be permitted to issue to themselves without further consideration the remaining four-fifths of that stock. The assets transferred by them to the corporation are worth more than \$200,000, and justice requires they should be thus protected. The proof does not warrant us in holding that Mr. Hall knew before the exchange was made that the capital stock of the second corporation exceeded that of the first. We are unable to agree with the plaintiffs that they should share in every subsequent increase of the capital stock without paying therefor. The contract does not so provide, nor is there anything in the record tending to prove that such an agreement was in the contemplation of the parties.

Rather the written memorandum, prepared by W. R. Bennett and subsequently produced at the dinner when the salaries to be paid to S. F. Bennett and to himself were discussed, contains an item to the effect that the Bennetts should have the privilege of subscribing for a *pro rata* share of any additional stock issued by the corporation, and might pay by note or in cash therefor. While these provisions do not appear in the contract, the memorandum is more convincing than counsels' argument concerning the intent of the parties, if that should be considered a controlling factor. The proof is clear that the Bennett Company incurred a large indebtedness to increase and successfully carry on its business, and that the Baums or the other corporations which they control are also liable for those debts. It is not just to require these sureties to lend their credit gratis to float that indebtedness and at the same time prevent the corporation from increasing and selling to the best advantage its capital stock to raise money wherewith to liquidate that debt or some considerable part thereof. Of course, the existing stockholders should be given a reasonable opportunity to subscribe and pay for their *pro rata* share of this stock before an attempt is made to sell it to outsiders, and five days' notice we do not consider reasonable.

The defendants complain that there is no allegation in the petition to justify so much of the decree as quiets in the Bennett Company title to the real estate acquired by Mr. J. E. Baum from the W. R. Bennett Building Company, and we think there is merit in the contention. There are general charges in the petition that the Baums fraudulently diverted and converted the assets of the Bennett Company, but the referee specifically found that the proof did not sustain these charges. This finding is not excepted to and must be considered unimpeachable evidence of the fact. It seems to us that the Bennett Company should receive the legal title to the real estate described in the referee's findings; but there should be

allegations in the pleadings to sustain this part of the decree. We have not overlooked the principle of law which requires the stockholder, as a condition precedent to prosecuting a suit to reclaim for the benefit of the corporation its assets, to request those in charge of its affairs to commence the suit; but, in the light of all of the facts in this case, we shall not apply it. We have been impressed with the crying necessity of terminating this litigation in such a manner as to dispose of all the contentions of the interested parties, and shall endeavor to do so.

The Baum Building & Realty Company, in consideration for the Baums' agreement to transfer to it all of the real estate acquired by them from the W. R. Bennett Building Company, issued to them all of its capital stock; but the Baums did not transfer the legal title to the real estate. In so far as this stock, or that of its successor, may be in the hands of persons not parties to this litigation, it is controlled by the defendants Baum and was received with full notice of all of the plaintiff's equities, so that if it is lawful and just to sustain the referee's findings and the court's decree, quieting the title to the real estate in the Bennett Company, we should not hesitate to affirm that judgment, because of the alleged nonjoinder of parties defendant. The Bennetts and Mr. Hall, their trustee, accepted the Building & Realty Company's stock under the circumstances surrounding them when Mr. Hall accepted the stock of the Bennett Company; but we do not think the principles of estoppel apply with equal force to both transactions. The Building & Realty Company was created for the sole purpose of holding the title to this real estate for the benefit of the Bennett Company; it did not incur indebtedness on the strength of the reincorporation, nor do we think that the Baums will be prejudiced by consolidating in the Bennett Company title to all of the real estate of which it is the equitable owner. We can understand that it may have been wise to permit Baum and the Building &

Realty Company to hold the naked legal title to the real estate, carrying the net value of those properties on the books of the Bennett Company, as part of its assets, and thereby enable the Bennett Company to make a showing of net worth without exposing its liability for the incumbrances upon the real estate; but, while the net value of this real estate seems to have been and to be constantly and rapidly increasing, the Baums enter only about one-fifth of that value on the Bennett Company books, so that, should the plaintiffs desire to sell their stock, they will be greatly prejudiced by a condition which will create in the mind of an investor doubt concerning the actual interest which the Bennett Company has in that valuable real estate. But, however liberal we may desire to be in affirming a judgment, we cannot sustain a finding which is not responsive to any allegation in the pleadings, nor to a theory mutually adopted by the litigants in the district court. We have the authority to permit amendments in this court. We therefore shall permit the plaintiffs, if they are so advised by counsel, to amend their petition so as to allege such facts as will justify us in sustaining the decree quieting title in the Bennett Company to all of the real estate described in the referee's report, and to a decree for a specific performance of their contract for one-fifth of the \$200,000 capital stock of the Bennett Company. Ordinarily such amendments would not be permitted. In the instant case counsel for the defendants strenuously objected to the introduction of all evidence touching title to this real estate. We are confident, however, that the defendants will not be prejudiced by the amendments, because all features of the transactions touching those subjects have been testified to by the only persons having knowledge thereof, and this litigation should cease at as early a day as possible.

The referee's statement of the accounts between the Bennett Company, on the one part, and J. E. Baum, D. A. Baum, the Baum Iron Company and the New Paddock-Hawley Company, on the other part, finds the

true balance in each account on the basis that all of the corporate stock issued by the second corporation is canceled. By reinstating that stock, no change is made in those accounts, nor should the Baums be charged any additional sum for the \$160,000 capital stock of the Bennett Company we hold they are entitled to in consideration for the assets transferred, or agreed to be transferred, to it by them; the intention being to hold that the plaintiffs are entitled to one-fifth and the Baums to four-fifths of the capital stock of the Bennett Company as organized in 1904.

The defendants argue that since the Baums acquired title to the real estate theretofore held by the W. R. Bennett Building Company in the forenoon of the day the contract in suit was signed, and it was executed in the evening, no consideration sustains that contract. We find no such issue tendered by the answer, nor would the proof support it, if pleaded. It is evident that the purchase of the assets of the W. R. Bennett Company at trustee's sale, the subsequent transfer of the real estate owned by the W. R. Bennett Building Company, and the signing of the contract were all parts of the same transaction, and that an ample consideration sustains the contract.

Some criticisms are made with respect to the value placed by the referee upon the furniture, fixtures, vehicles and horses owned by the Bennett Company, and also concerning three items aggregating \$3,137.77, which the defendants contend should have been charged to profit and loss. The three items we think should have been thus charged. We do not think it necessary to substitute our judgment for that of the referee and the district court concerning the value of the furniture, fixtures, live stock and rigs, because the defendants are not required to pay money or to declare dividends upon the basis of those findings and will be at liberty in the future transactions of the corporation's business to exercise a reasonable judgment concerning these items.

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We find that the plaintiffs and the defendants should each pay their costs in this court, unless the plaintiffs refuse to amend their petition; in that event the plaintiffs will be taxed with all the costs in this court.

The judgment of this court is that the plaintiffs are given 40 days from the filing of this opinion to so amend their petition as to sustain the findings of the referee and the judgment of the court quieting in the Bennett Company title to all of the real estate described in those findings and to sustain a decree for a specific performance of their contract for one-fifth of the \$200,000 capital stock of the Bennett Company. If those amendments are filed, the judgment of the district court will be modified so as to recognize the validity of the incorporation of the Bennett Company in 1904, and so as not to enjoin the stockholders of that corporation from lawfully amending its articles of incorporation or increasing its capital stock, and to compel the Baums to specifically perform their contract to deliver one-fifth of the capital stock of the Bennett Company to the plaintiffs. In all other things the judgment of the district court will be affirmed. If the plaintiffs fail to amend their petition as aforesaid, the judgment of the district court will be reversed, with directions to modify its judgment so as to conform to this opinion.

JUDGMENT ACCORDINGLY.

WILLIAM O'GRADY ET AL., APPELLANTS, V. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLEE.

FILED NOVEMBER 28, 1911. No. 16,549.

1. **Pleading: CONSTRUCTION.** Section 121 of the code commands the courts to construe with liberality the allegations in pleadings with a view to doing substantial justice between the litigants.
2. **Carriers: ACTION FOR LOSS OF BAGGAGE: PLEADING.** A petition charging, in substance, that a common carrier's porter refused a

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passenger for hire, who with her nine infant children, also passengers for hire, were changing cars on the defendant's railway at a point intermediate the commencement and the end of their journey, readmission to the car in which she had been transported, and from which she desired to take her suit case with its contents, of the value of \$1,525, although the porter knew that her suit case was in the car and she informed him of her purpose, but that he wilfully refused to admit her, and that although the train thereafter remained for a long time at the station, and she informed the carrier's agents and servants in charge of the train that her suit case was in the car, they refused to deliver the suit case or to permit her to enter the car for the purpose of securing her property, and that it was not delivered to her and she has not received it, states a cause of action against the carrier.

APPEAL from the district court for Furnas county:
ROBERT C. ORR, JUDGE. *Reversed.*

Perry, Lambe & Butler and R. D. Druliner, for appellants.

James E. Kelby, Arthur R. Wells and W. S. Morlan, contra.

ROOT, J.

This is an action to recover damages for the loss of a suit case and its contents. The defendant prevailed on its general demurrer to the petition, and the plaintiffs appeal.

In substance, the plaintiffs, after alleging that the defendant is a common carrier for hire of passengers, charge that on April 15, 1908, for a consideration paid, defendant undertook to transport them with their baggage from Superior to Haigler, Nebraska; that they were informed by defendant's servants and agents that its train numbered 15 would convey them without change of cars to their destination, and that in reliance upon this information they entered a car in that train. The pleader also alleges that the youngest plaintiff is one year of age and the eldest infant plaintiff is 15 years old; that the plaintiffs carried with them into the defendant's

car a suit case which contained \$1,500 in currency and other articles, not definitely described, of the value of \$25, the joint property of all of the plaintiffs; that the train arrived at McCook, a city intermediate the initial and the final point of their journey, after midnight, and while they were asleep, and that the defendant's servants aroused them suddenly and directed them to immediately leave the train, which they did under the impression that they were in Haigler, and because of the defendant's orders; that they were excited, and relied upon the defendant's employees to carry from the car their luggage; "that soon after the plaintiffs reached the platform of the defendant company's station at McCook, Nebraska, the plaintiffs discovered that neither the porter, brakeman, nor other agent or employee of the said defendant company had brought the plaintiffs' said grip or suit case containing the said \$1,500 in currency to the station platform, as was the duty of the agents and employees of the defendant company, under the circumstances; that immediately thereafter the plaintiff Maggie O'Grady, having succeeded in getting all of the said nine children upon the depot platform, attempted to board the said train for the purpose of securing the said grip and the money contained therein, but that the defendant company's porter refused the plaintiff Maggie O'Grady admittance to the said train, although the plaintiff Maggie O'Grady informed the said porter, agent and employee of the said defendant company that he and other employees of the defendant company had failed to carry out for her said grip, and also informed the said porter that the said grip was then in a certain car, which the said porter then knew, and which said car plaintiff informed the porter she had just alighted from; that the said agent and employee of the said defendant company knew, and had known during the plaintiffs' entire journey, that said certain grip or suit case was the property of the plaintiffs herein, and had knowledge in reference to the value of the contents thereof; * * *

that the said train remained at the station of McCook thereafter for a long time, and that all of the agents and employees of the defendant company wilfully, negligently, and maliciously refused to deliver said grip or suit case to the plaintiffs herein or to permit the said plaintiffs or any of them to enter the said car in which said grip or suit case and money was left," etc. There are other allegations in the petition to the effect that the porter wilfully, negligently and maliciously prevented the plaintiffs from recovering the suit case; that they immediately reported their loss to the defendant's general office, but that the suit case and its contents were not returned to them; that the defendant was negligent in employing dishonest servants and agents, and that it did maliciously steal, take and carry away this property. Upon the hearing, the plaintiffs admitted in open court that the defendant had no notice or knowledge that there was money in the suit case until its agents discovered the fact after the plaintiffs entered the car at Superior. Some of the allegations in the petition may be surplusage, and the pleader might have been more definite in alleging that the suit case was in the car at the time the plaintiffs departed therefrom, but we cannot agree with the defendant's counsel that this fact may not fairly be inferred from the petition.

Section 121 of the code commands the courts to liberally construe the allegations in all pleadings with a view to substantial justice between the parties. The pleader alleges that the train remained a long time at McCook, and that the porter wilfully and maliciously prevented the plaintiff Mrs. O'Grady from re-entering the car very soon after she departed therefrom, and the demurrer admits the truth of these statements. It should be remembered that the defendant had not then completed its contract to safely transport the plaintiffs and their baggage from Superior to Haigler, but they were passengers in the course of transportation. In view of the fact that the necessity for the change of cars was

occasioned by the misdirection of the defendant's servants, and that Mrs. O'Grady was hampered by her numerous sleepy infant children, the defendant at least owed her the duty of a reasonable opportunity to take her luggage as well as her children from the train. If that opportunity was not given, but absolutely refused without just cause, the defendant should at least be held to have elected to transport the suit case in the car where it reposed, and should be held from that time to at least so high a degree of responsibility as if the luggage were in the custody of its baggageman. Whether under these circumstances the company may be held liable for all of the money in the suit case is not before us for determination and will not be discussed. It is sufficient for this appeal that, if all of the allegations in the petition are true, the defendant is liable to the plaintiffs in some amount. This we hold.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

JANE H. W. REYNOLDS ET AL., APPELLANTS, V. JULIA A. ADAMS ET AL., APPELLEES.

FILED NOVEMBER 28, 1911. No. 16,557.

1. **Judgment:** *NUNC PRO TUNC* ENTRY. Where it is clear that a judgment was rendered or an order made by the district court in an action then pending, but through the inadvertence or carelessness of the clerk the judgment or order was not entered on its journals, the court may subsequently upon motion, after notice to all persons affected thereby, cause the entry to be made *nunc pro tunc*.
2. ———: ———: **NOTICE.** In such proceedings it is not necessary to notify persons impleaded as defendants, but dismissed from the action before the judgment was rendered or order made.
3. ———: ———: **PROCEDURE.** If the person injuriously affected by the fault of the clerk departs this life, his legal representatives may maintain the proceeding in their names to supply the record.

4. ———: ———: NOTICE. If the person benefited by the incomplete condition of the record departs this life without conveying or assigning his interest in the subject matter of the litigation, notice may be served on his legal representatives, and, on satisfactory proof, the record corrected.

APPEAL from the district court for Frontier county:
ROBERT C. ORR, JUDGE. *Reversed.*

H. W. Keyes and J. L. McPheely, for appellants.

W. S. Morlan and J. L. White, contra.

ROOT, J.

This is a proceeding for *nunc pro tunc* entries in an action formerly pending in the district court for Frontier county. The motion was denied, and the aggrieved parties appeal.

The district court refused to receive any of the evidence offered. Most of this evidence is documentary, and appears in the bill of exceptions. All of the objections made in the district court by appellees' counsel are, for practical purposes, identical and amount to this: All of the parties to the action were not notified of the application, the proceeding is barred by the statute of limitations, and the notice did not give warning that oral evidence would be produced. In this court the argument is confined to the alleged failure to notify all parties to the action and a contention that strangers to the record are not entitled to the relief demanded.

The entries requested are of an alleged decree foreclosing a real estate mortgage and an order confirming a sale by the authority of that decree. The applicants are Jane H. W. Reynolds, Estate of J. E. Seeley, deceased, and Paul S. Seeley. They allege that the action was commenced by Jane H. W. Reynolds against John Black, Mary E. Black, Harrison W. Adams, and J. E. Seeley; that Black owned the real estate in 1887, and during that year, after executing a mortgage thereon to

Jane H. W. Reynolds, conveyed the land to one Herrin, who subsequently conveyed it to Harrison W. Adams; that the defendants Adams and Seeley were personally served with summons in the foreclosure suit, which was subsequently dismissed as to the defendants Black, and thereupon a judgment of foreclosure was rendered, by virtue whereof the sheriff advertised and sold the land to Jane H. W. Reynolds; that the sale thereafter was duly confirmed and a deed by order of the court made to the purchaser; that, owing to the inadvertence or carelessness of the clerk of the district court, the decree and the order were not spread upon its journals; that the purchaser, in 1896, sold and conveyed the land to J. E. Seeley, who, in 1902, departed this life testate, devising all of his property to the applicant Paul S. Seeley, and that in 1898 Harrison W. Adams died intestate, leaving a widow, Julia A. Adams, and two adult sons, James W. Adams and Jasper H. Adams, as his sole heirs at law. A copy of the motion, which recites all of these facts, was served on each of the heirs and on the widow of the deceased Adams. No pleadings seem to have been filed in opposition to this motion, but the bill of exceptions recites that the counsel resisting the motion appeared for Harrison W. Adams (deceased), James W. Adams and Jasper H. Adams. We shall consider the record on the theory that Mrs. Reynolds and Paul S. Seeley are the sole applicants.

The law is well settled that the district court has the inherent power upon sufficient showing to enter upon its journal an order or judgment as of a prior date, if that order or judgment was made or rendered on that earlier date, but through the negligence or inadvertence of the clerk was not entered on the journal. *Garrison v People*, 6 Neb. 274; *Phelps v. Wolff*, 74 Neb. 44.

This proposition is not seriously controverted, but counsel for the Adamses say that the district court could not make that order unless all of the parties to the action were before it, and that the Blacks and J. E. Seeley have

not been notified of the filing of this motion. The Blacks are not parties to the judgment because the action was dismissed as to them before the decree was rendered. Mr. Seeley is no longer in life, and Paul S. Seeley has succeeded to his title to this property. Harrison W. Adams, the owner of the equity of redemption at the time the decree is alleged to have been rendered and the order of confirmation made, also subsequently departed this life, but his sole heirs at law have been notified of this application.

Proof was also offered that the estate of Mr. Adams had been administered and his estate distributed among his heirs. Documentary evidence was offered showing a connected chain of title from the United States to Harrison W. Adams. The deed duly executed by Mrs. Reynolds conveying this land to J. E. Seeley was offered in evidence. So that, if the evidence excluded had been received, the proof unexplained would establish that but four persons had any interest in this land—Mrs. Julia A. Adams, doweress by virtue of her husband's seizin and death, and the failure to make her a party to the foreclosure action; James W. Adams and Jasper H. Adams, as sole heirs of Harrison W. Adams, deceased; and Paul S. Seeley, as the sole devisee in the will of J. E. Seeley, deceased. The appellants concede Mrs. Adams a dower interest in the land. So far as the Blacks are concerned, they cannot be affected by the entries requested, and it was not necessary to notify them of this application. *Turner v. Christy*, 50 Mo. 145. If the action were pending for any purpose, James W. Adams and Jasper H. Adams represent their ancestor. *Urlau v. Ruhe*, 63 Neb. 883.

The evidence offered should have been received, and, if the allegations in the motion are proved, the court journals should be made to speak the truth.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

MARGARET L. SABIN, APPELLEE, v. JOSEPH J. CAMERON,
APPELLANT.

FILED NOVEMBER 28, 1911. No. 16,863.

1. Appeal: INSTRUCTIONS. Alleged error in giving an instruction will not be considered where no exception was taken thereto and no reference was made to it in the motion for a new trial.
2. Contracts: CONSTRUCTION: QUESTION FOR JURY. "Where a written contract requires extrinsic evidence to explain its terms, the interpretation to be given in view of such evidence is a question of fact." *Haskell v. Read*, 68 Neb. 107.
3. ———: ———: QUESTION FOR COURT. But, in the absence of a latent ambiguity, this principle will not ordinarily apply to those terms of a written contract which are plain and unmistakable in their meaning when considered by themselves and in connection with the remainder of the contract.
4. ———: BUILDING CONTRACT: EXTRAS. A builder ordered by the proprietor to do work in some way connected with the original contract, but substantially independent of it, under such circumstances that the owner should know that the execution of her orders will cause extra trouble and expense to the builder not contemplated by the terms of the contract to build, has a just demand for reasonable compensation for the extras if the original contract does not provide to the contrary.
5. Appeal: INSTRUCTIONS. It is prejudicial error to submit to the jury a controverted defense not sustained by any evidence.
6. ———: AFFIRMANCE ON CONDITION. Where a case has been twice tried in the district court and in this court, if by imposing terms as a condition to affirming the judgment substantial justice may be done between the litigants, it is competent for this court to do so.

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Affirmed on condition.*

Burkett, Wilson & Brown, for appellant.

Burr, Greene & Greene, contra.

Root, J.

This is an action against a contractor to recover for money paid by the plaintiff to relieve her property from the lien of a subcontractor. The defendant pleaded a cross-demand for extras. The plaintiff prevailed, and the defendant appeals.

This is the second appeal of this case. The opinion heretofore filed and reported in 82 Neb. 106, is referred to for a description of the litigant's contentions. Subsequent to the reversal an amended and supplemental petition and an amended reply were filed.

The defendant's first contention, that the evidence is insufficient to sustain the supplemental matter pleaded, will not be considered, for the reasons that he took no exception to instruction numbered 3½, wherein the court peremptorily directed a finding in the plaintiff's favor on her cause of action in the sum returned by the jury, and did not refer to the instruction in his motion for a new trial. *Holloway v. Schooley*, 27 Neb. 553; *Richardson & Boynton Co. v. Winter*, 38 Neb. 288; *Wiseman v. Ziegler*, 41 Neb. 886; *Danforth v. Fowler*, 68 Neb. 452. This leaves for consideration solely the errors assigned with respect to the trial of the defendant's cross-demand. It is contended that the jury should have been instructed that the reply admitted that the defendant furnished the items described in the cross-petition. Neither the pleadings nor the proof raise any such an issue. The instructions fairly construed concede that the items were furnished, but leave it for the jury to determine the defendant's contention that the items were extras, and the plaintiff's theory that all of the items not extras were gratuitously furnished.

The remaining assignments meriting serious consideration are as follows: Permitting the plaintiff to testify over objections that, before the written contract was reduced to writing and signed, she talked with the defendant about all of the items included in his demand for

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extras; instructing the jury that they should find from the evidence whether the extras were within the terms of the contract; and submitting to them as an issue of fact whether the extras, if any, were furnished gratuitously and without expectation of reward. The contract is as follows:

"CONTRACT.

"LINCOLN, NEBR., 10-17, 1904.

"Mrs. Sabin.

"The undersigned does agree to do all work described in the above article of agreement, build two bathrooms, one over the other, on east side of kitchen, with window in each room, and cut door from hall to bath on second floor, and cut door in same way on first floor. Board outside and paper and plaster the inside with hard wall and 4 ft. high with Keyn cement, and strike off to make imitation of tile. Give tile and tub three coats of enamel, color to suit owner. Fit the upper bath with closet, tub, and lavatory with old fixtures, put new tub with nickel plated waste and supply all standard or S. Wolff goods. Put in complete hot and cold water. Put in one 18x30 sink.

"This work will be done to comply with the city ordinances. Lay maple floors in bathrooms and finish in yellow pine. Give one coat of filler and two of hard oil, and paint all new work two coats to match old house as near as possible. Cut openings from front room to next room north, and give owner choice of sliding door or one post grill. Take out closet door in front room, and put in hall in same closet. Cut door from dining-room to kitchen. Take out all back stairs and close up door. Make old bathroom and back bedroom in one. Leave windows and doors as they are, and patch the floor in places needed. Put closet in north end of old bedroom, using old door now in hall. Put in one window in kitchen so as to allow a table under it. Fit up sink and pantry on west side of kitchen. Cut back door to porch. Take off all rim locks on all doors on second floor and replace with mortice, No. 23 finish.

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"Back Porch.

"Build back porch 12x16 and make room under porch; close porch up to the east and north from lower floor to four feet above upper floor, then cap the inclosure and screen from there to frieze. Make stair from upper porch inside of the inclosure. Lay double floor on upper porch so as not to leak. Put on tin roof of good roofing tin. Move outside cellarway and one window. All the new rooms will be heated by the furnace now in the house with returns where needed. Put stone foundation under both and room under porch and make all work complete.

"Make a way to get to attic after the same plans of Mr. Hardy's is. Gas can be made separate by changing riser pipes it will be changed but if not it can't be changed. Move tank in back hall so as to make room for door. Contractor will take all old sash.

"(Sign) J. J. CAMERON.

"(Sign) M. L. SABIN.

"LINCOLN, NEBR., 10-19, 1904.

"I, the undersigned, will do all the described work and furnish all labor and material to be used for the sum of one thousand and ninety dollars (\$1,090.00). If old closet and wash bowl is used

10.00

\$1,080.00

"Money shall be paid as the work progresses, and when the final finish shall come the undersigned will furnish receipts for all labor and material and deliver to owner.

"(Signed) J. J. CAMERON."

The contract is not aided by specifications, and several of its terms are ambiguous. Some written contracts are to be construed solely by reference to their terms, but there are undertakings which should be interpreted in the light of extrinsic evidence to ascertain the things upon which the minds of the parties meet. In the first class the proper construction to be given the contract is ordinarily a question of law for the court to decide, but in

the second class the facts which may aid a correct construction, if not admitted or undisputed, should be submitted to the jury under proper instructions, and the interpretation of the contract becomes in a sense a question of fact. *Coquillard v. Hovey*, 23 Neb. 622; *Rosenthal v. Ogden*, 50 Neb. 218; *Meyer v. Shamp*, 51 Neb. 424; *Haskell v. Read*, 68 Neb. 107.

This rule will not apply to those terms of a written contract which have a plain and unmistakable meaning, and are so connected with the remaining parts of the contract that they require no interpretation, but speak plainly for themselves. Nor, in an action to enforce and not to reform the contract, does this rule open the door for the reception of oral evidence to show that, before the contract was signed, the parties talked about items plainly without the terms of the contract as written. We think that some of the terms of the contract under consideration do not carry on their face satisfactory proof of their meaning, but are ambiguous to a degree justifying proof of extrinsic facts to ascertain their import. The extra item, "To gas separate from lower floor and back porch," might come within the clause in the contract "Gas can be made separate by changing riser pipes it will be changed but if not it can't be changed." Whether the glass for the bathroom windows should be plain or chipped is not clear from the contract. Nothing is said in specific language in the contract with relation to steps or lattice work for the porch, but the defendant agreed with respect to the porch to "make all work complete." A porch would be incomplete without steps, and possibly the lattice work might have been within the contemplation of the parties. Concerning the following items, we are satisfied the contract, unless reformed, cannot be construed to include them: Maple floor in kitchen; changing cellar stairs and making cupboard, seven closets in same; closet under stairs in room under porch; moving door three times after plastering; one door, frame, and hardware; stopping old cold air ducts; plate shelf in dining room.

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We think the rule with regard to the right of a builder to charge for extras is well stated by Judge Marshall in *Fitzgerald v. Walsh*, 107 Wis. 92, 81 Am. St. Rep. 824: "It is well settled that where a builder is ordered to make changes from the original contract plans, which are really extras, or to do work in some way connected with the original contract but substantially independent of it, and the circumstances are such that the proprietor must know that the execution of such orders will cause extra labor and expense to the builder not contemplated by either party in the original contract, he is liable to compensate the builder therefor in the absence of some express provision in such original contract to the contrary." See, also, *McLeod v. Genius*, 31 Neb. 1.

Mrs. Sabin resided in a part of the house while the defendant was making the improvements, and requested him to perform the work for which he is demanding compensation. She must have known that Mr. Cameron could not comply with her requests without expense for material and labor. There is no provision in the written contract forbidding the contractor constructing extras, nor providing conditions precedent to his right to compensation or denying him compensation therefor. Upon the former appeal it was held that there was no competent evidence to prove that the extras were gratuitously furnished, nor any issue to permit the introduction of that proof. The pleadings were amended to present the issue, but the evidence did not justify submitting the issue to the jury. The amount involved in this litigation is not great; the case had been twice tried in the district court and in this court, and, if possible, it should be terminated now. Since the action is at law, we may not try it *de novo*, but we may impose reasonable terms as a condition for an affirmance. While there is error in the matters just referred to, we believe that we are justified in affirming the judgment if the plaintiff will remit such a sum as the defendant is clearly entitled on the evidence to recover for extras that

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are clearly without the terms of the written contract. That sum, as we understand the record, is \$106.25.

If the plaintiff within 50 days after the filing of this opinion will file a remittitur of \$106.25 with 7 per cent. simple annual interest from July 1, 1905; the judgment of the district court will be affirmed, and each party will pay their own costs in this court. Otherwise the judgment of the district court will be reversed and the cause remanded for further proceedings.

AFFIRMED.

**ANNA J. WILSON, APPELLANT, v. L. AUGUSTUS WILSON,
APPELLEE.***

FILED NOVEMBER 28, 1911. No. 16,930.

1. **Insane Persons: GUARDIANSHIP: DUTIES OF GUARDIAN.** A husband appointed as guardian of his insane wife's estate sustains a peculiarly close and confidential relation to her, and will not be permitted to use her property or his position for his advantage or to her detriment.
2. —: —: —. The county court may authorize a guardian to invest his ward's funds, and the guardian should apply for directions, in case he holds such funds and a threatened foreclosure of a real estate mortgage may, if prosecuted to a conclusion, result in the sacrifice of her dower and homestead interests in the mortgaged land; and the fact that while sane she proposed to permit the land to be sold at judicial sale, so that she could secure money in lieu of her interest in the real estate, will not justify inaction on his part.
2. —: —: —. **LIABILITY OF GUARDIAN.** If the husband and guardian of an insane woman purchases at judicial sale real estate wherein she has dower and homestead estates which have not been admeasured, upon becoming sane she may hold him as trustee, without regard to whether there was active fraud in the transaction.
4. **Trial: CONSOLIDATION OF ACTIONS.** A county court has exclusive original jurisdiction to settle the accounts of guardians appointed by it; but if some features of that accounting are also involved in an action in equity pending in the district court between the guardian and ward, and the contention with respect to the

* Motion to modify opinion overruled. See opinion, p. 360, *post*.

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guardian's accounts is pending in that court on appeal, the district court should consolidate the cases for trial, so that the rights of the parties will be fully protected.

5. **Insane Persons: GUARDIANSHIP: LIABILITY OF GUARDIAN.** Where, in an action to foreclose a real estate mortgage, the court appoints a guardian *ad litem* for an insane woman, who has a dower and a homestead estate in the land, and the general guardian fails to protect these estates, the general guardian will not, solely for that reason, be liable in damages.
6. ———: ———: **ACCOUNTING.** A guardian should account to a ward for all profits made by investing or converting her funds, and, if not authorized by the county court to invest the funds, will be held for lawful interest, without regard to the profits made.

APPEAL from the district court for Gosper county:
ROBERT C. ORR, JUDGE. *Reversed with directions.*

Francis G. Hamer, R. D. Stearns and Lafe Burnett.
for appellant.

O. E. Bozarth and Ritchie & Wolff, contra.

ROOT, J.

This is an action for a judgment that the defendant holds title to a tract of land as trustee for the plaintiff, and for an accounting. The defendant prevailed in part, and the plaintiff appeals.

There is some conflict in the evidence, but many material facts are proved by undisputed evidence. In October, 1904, the plaintiff, the widow of W. A. Scales, who died in 1902, leaving the plaintiff and an infant daughter, Gladys, him surviving, was married to the defendant. Mr. Scales died seized of the land in dispute, and with his wife and child occupied it as a homestead at the time of his death. Walker Smith was guardian of the property of Gladys Scales. The land was mortgaged by Scales and wife to secure the payment of \$900 borrowed money, and several interest payments were unpaid in 1904.

The plaintiff, subsequently to her last marriage, determined to bring about a sale of the land, so that the

proceeds might be divided between the owners in proportion to their interests. Having this purpose in view, the guardian and Mrs. Wilson consulted counsel, and were advised that the guardian might procure a license from the district court and sell the land, provided she would waive her homestead right. Thereupon the guardian made application to the district court for license to sell all of the 320 acres in dispute in this action, but before the proceedings were consummated Mrs. Wilson became insane, and March 27, 1905 was, by the commissioners for the insane in Gosper county, committed to the asylum near Lincoln, where she remained until paroled or discharged in 1908.

July 31, 1905, the mortgagee, at the guardian's request, commenced an action to foreclose the mortgage. There was personal service of summons on all of the parties in interest and upon the superintendent of the hospital for the insane where Mrs. Wilson was confined. Mr. Wilson, having been appointed guardian of his wife's estate, answered for her, contending solely for the value of her dower estate and for the amount of a claim allowed in her favor against the estate of her deceased husband, Scales. A guardian *ad litem* was appointed for the infant and for the insane woman, but the record does not disclose whether he answered for his wards. The decree finds the amount due the mortgagee, the amount of taxes paid, the present value of Mrs. Wilson's dower estate, and that she was entitled to her claim against the Scales' estate. At the sheriff's sale the defendant purchased the land for \$5,675, a greater sum than the land was worth, if we should believe the undisputed testimony on this point. After sale, but before confirmation, Mr. Wilson, having been elected sheriff of Gosper county, assigned his bid to Mrs. Bozarth, wife of his present counsel, and in her name the sale was confirmed, and to her a deed was made. In the order of confirmation the court directed the proceeds of the sale to be distributed as follows: To the mortgagee, \$1,201.55; for costs,

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\$120.65; for taxes, \$46.53; for the guardian *ad litem*, \$5; to Mrs. Wilson or to her guardian, \$500 in lieu of her dower, and \$419.73 in satisfaction of her claim against the Scales' estate; the remainder of the \$2,500 to Mr. Smith, as guardian for Gladys Scales; and the notes for the remainder of the purchase price were ordered to be made payable to her and delivered to her guardian. All of which was done.

In this action the district court adjudged that the plaintiff should recover her dower and a homestead estate in the land, but burdened with a lien for \$1,114.79, of which sum \$458.36 was made a lien on the homestead and dower estate, and \$656.43 a lien solely upon the dower estate. We are advised by the arguments, but not by the record, that the district court took an accounting for rents and profits and for taxes paid, and carried the balance into the decree. The defendant in his answer, among other things, pleaded that there had been an accounting in the county court in the matter of his guardianship of his wife's estate, and that subsequently that contention was appealed to the district court, where it was pending, and that in those proceedings he was pursued for the money held by him in lieu of his wife's dower interest in the land and for the rents and profits of the land in dispute. It has also been brought to our attention that the record of those proceedings has been lodged here on appeal, and that it is contended that by some chance the bill of exceptions of the evidence adduced during the trial is incomplete, to the prejudice of Mrs. Wilson.

It is, of course, elementary law that the ward may, at her election, accept the price paid by her guardian for her property or recover the property itself, without regard to the motives which impelled him to act or whether there was active fraud in the transaction. *Michoud v. Girod*, 45 U. S. *503; *Veeder v. McKinley-Lanning L. & T. Co.*, 61 Neb. 892; *Kazebeer v. Nunemaker*, 82 Neb. 732. The guardian also will hold as trustee, for the benefit of

his ward, the title to any property he may have purchased with her funds.

There is evidence tending to prove that the plaintiff's money entered into the cash payment of \$2,500 at the sheriff's sale, although the defendant denies that fact. The cross-examination on this point was not pressed, and we are not entirely satisfied with the disclosure, but, for the purposes of this case, shall treat the subject as though his funds were solely used for that purpose. Approaching the controversy from this standpoint, we are not satisfied that the defendant should be permitted, over his ward's objections, to retain title to this land. The relations between these parties are the most confidential known to man. The defendant, by virtue of his marital obligations and his duty as the plaintiff's guardian, owed her the highest duty to conserve her property, and the law will not permit him to use either his wife's funds or his position to secure the slightest advantage to her detriment. Her dower and homestead estates had not been admeasured, but were involved with the remainder vested in her infant daughter. The defendant's contention that he owns the land by a title in fee simple makes his interests conflict with those of his ward, and places him in an attitude the law will not permit him to assume. As guardian, the defendant possessed ample funds to redeem the land or to purchase the incumbrance. Of course, he could not thus invest those funds without an order of the county court, made upon formal application, and it is true that his wife, while sane, expressed an aversion to having her estate invested in the land; but the experience of ages has demonstrated that trust funds are rarely so secure as when judiciously invested in well-secured real estate mortgages or in improved farms, and the defendant would be in much better position if he had presented the subject for the determination of that court. Having elected to purchase, rather than to otherwise protect the estate of his ward and wife, we think she has the right, upon equitable terms, to accept

and receive the benefits attendant upon that transaction. 1 Perry, Trusts and Trustees (6th ed.) secs. 427, 428.

The defendant contends that the plaintiff, by pursuing him in the guardianship proceedings for an accounting, elected to recover her funds, and thereby waived any right to recover title to the land. The plaintiff has a right to a strict accounting to ascertain the amount of her property received by the guardian. When the exact amount due her is thus ascertained, should she accept the balance with knowledge of the sources from which the money came, she would be within the rule announced in *Borcher v. McGuire*, 85 Neb. 646.

In the first instance the county court had exclusive jurisdiction to settle that account, but by appeal the subject matter could be presented to the district court. This has been done. When the district court acquired jurisdiction of the controversy, it seems to us that case and the instant one should have been consolidated, to the end that a decree protecting all of the parties in interest should be made. As it is, we are met with contentions that the value of the rents and profits of the farm and the dower estate were considered in both cases, and those contentions are denied. The fragments of the one record offered as evidence in the other do not satisfy us concerning the actual fact, although they are doubtless sufficient for counsel duly advised by other evidence.

It is important that the court should have a complete disclosure of the source of the \$2,500 cash payment made by the defendant at sheriff's sale. If it be true that this was his own money, not advanced by some person on the credit of the money in his hands as guardian, he should be credited on the accounting with interest on the sum so paid; but, if any portion of such payment was made up of money or credits of his ward, such portion should be deducted from the \$2,500, and he would be entitled on the accounting to interest on the remainder.

We shall sustain the plaintiff's contention that the defendant holds title to this land in trust for her; but,

concerning her contention that he should be held for damages because her homestead exemptions were not preserved in the foreclosure action, we have to say that the mortgage was a lien on every estate in the land, and the sale, had it been made to a third person, would have vested the purchaser with all of the title of all of the parties to the action. The court did not rely on the defendant to protect the plaintiff's interests, but, by appointing a guardian *ad litem* for her, took this matter out of Mr. Wilson's hands. The defendant paid full value for the land; the plaintiff's daughter received the equivalent of the plaintiff's homestead estate, and we find nothing in the record to suggest that he intended to prefer his stepdaughter to his wife in the foreclosure case. We discover no such evidence of bad faith on his part as will justify a court of equity mulcting him in damages for this phase of the foreclosure case.

The case involving the guardian's accounts will be advanced and reversed, without a decision on the merits, to the end that it may be consolidated with this action for trial. The district court will determine from the record, and such other evidence as the litigants may offer, the true state of the accounts between the litigants. The defendant should be credited with all of the money paid by him on the purchase price of the farm, including what he has paid on the mortgage debt and for taxes and improvements, with 7 per cent. simple annual interest on those payments; he should be charged with the fair value of the rents and profits of the farm, with like interest, and the district court should decree that if the plaintiff, within three months thereafter, will pay to the defendant the difference between the aggregate of those credits and debits, the defendant shall execute a deed of conveyance to her for all of the real estate, and if the deed be not made the decree will operate as a conveyance.

In the matter of the guardianship accounting, should it appear that the defendant directly or indirectly profited by the possession or use of his ward's funds,

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either by investing them in the land in dispute or by receiving interest thereon, he shall be charged with as high a rate of interest thereon as he has received, but not less than 7 per cent., or, if the money was invested in the land, .7 per cent. simple annual interest, less taxes paid and lawful charges against the fund, whether by payments of accounts, costs, expenses or compensation allowed by law.

JUDGMENT ACCORDINGLY.

The following opinion on motion to modify former opinion was filed January 3, 1912. *Motion overruled:*

PER CURIAM.

The defendant requests a modification of the opinion, so the district court may not require him in the guardianship proceedings to pay the balance of funds due his wife, with interest, and, also, in the instant case give her credit for those funds on the purchase price of the farm. We do not think it possible that the district court will make such orders. It was to prevent any such injustice that the two causes were ordered consolidated. It is suggested that the plaintiff might, by immediately collecting the balance due her from her guardian and by delaying to the last day the exercise of her option to take the farm, secure an advantage over the defendant. We have no doubt that the decree of the district court will fully protect the defendant in these eventualities, none of which can arise if his testimony on the former trial, that he invested none of his wife's money in the land, be true.

The motion is

OVERRULED.

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IN RE ESTATE OF WILSON.

ANNA J. WILSON, APPELLANT, v. L. AUGUSTUS WILSON,
GUARDIAN, APPELLEE.

FILED NOVEMBER 28, 1911. No. 17,018.

APPEAL from the district court for Gosper county:
ROBERT O. ORR, JUDGE. *Reversed.*

R. D. Stearns and Lafe Burnett, for appellant.

O. E. Bozarth and Ritchie & Wolff, *contra*.

PER CURIAM.

For the reasons and purposes stated in the opinion in *Wilson v. Wilson*, *ante*, p. 353, the judgment herein is reversed and the cause remanded to the district court.

REVERSED.

MAGGIE DAVIS V. STATE OF NEBRASKA.

FILED NOVEMBER 28, 1911. No. 17,263.

1. **Homicide: INSTRUCTIONS: MALICE: PRESUMPTIONS.** "The law implies malice in cases of homicide if the killing alone is shown; but, if the circumstances attending the homicide are fully testified to by eye-witnesses, it is error to instruct the jury that there is a presumption of malice from the fact of the killing." *Lucas v. State*, 78 Neb. 454.
2. **Criminal Law: INSTRUCTIONS: DEFENSE OF INSANITY: EVIDENCE.** Jurors, in determining whether an accused at the time of the commission of the alleged crime was mentally competent to distinguish between right and wrong with respect thereto, should consider all of the evidence upon the subject and should not be instructed to only consider the opinions given by experts.
3. —: **DEFENSE OF INSANITY: EVIDENCE: REASONABLE DOUBT.** Where, during the trial of a criminal case, evidence is introduced tending to impair the presumption that the prisoner was of sound mind at the time the crime is alleged to have been com-

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mitted, it devolves upon the state to prove beyond all reasonable doubt that at the time the crime was committed she was mentally competent to distinguish right from wrong with respect thereto, and she is entitled to the benefit of any reasonable doubt that may arise from a consideration of all of the evidence, or from the lack of evidence, upon this issue.

4. ———: INSTRUCTIONS. "An erroneous instruction is not cured by the mere giving of another on the same subject contradicting it." *Henry v. State*, 51 Neb. 149.

ERROR to the district court for Cedar county: GUY T. GRAVES, JUDGE. *Reversed*.

R. J. Millard, for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton*, contra.

ROOT, J.

The plaintiff in error prosecutes her petition to reverse a sentence of life imprisonment upon a conviction of murder in the first degree.

There is but little conflict in the testimony, other than that given by the experts. About 8 o'clock P. M., November 2, 1910, the accused, in the presence of a Mr. Hall, fatally wounded Ira M. Churchill. There is considerable evidence tending to show illicit relations between the woman and her victim, induced by a promise of marriage, during the year 1910. The accused produced four physicians, who, in answer to hypothetical questions, testified that at the time of the homicide she did not have sufficient mind and understanding to know and appreciate that the act was wrong, and the state produced five physicians who testified to the contrary. In this state of the evidence, the court, by instruction numbered 11, told the jury: "The jury is instructed that the law presumes that a person intends all the natural, probable and usual consequences of his acts; that when one person assaults another violently with a

dangerous and deadly weapon, likely to kill, not in self-defense, or in defense of habitation or property, and not in a sudden heat of passion or sudden quarrel, and the life of the person thus assaulted is actually destroyed in consequence of such assault; then the legal and natural presumption is that death or great bodily injury was intended, and in such case the law implies malice and such killing would be murder."

The law is well settled in this state that, where the circumstances attending the homicide are proved by eye-witnesses, it is error to instruct that malice will be implied from the killing. *Vollmer v. State*, 24 Neb. 838; *Lucas v. State*, 78 Neb. 454; *Kennison v. State*, 80 Neb. 688. A majority of the court are of the opinion that, since it is clear from the evidence that the only possible legal excuse for the homicide was insanity, the instruction, while erroneous, was not prejudicially so.

We are of opinion that the court erred in giving its instruction numbered 23, which is as follows: "The opinion of the medical experts are to be considered by you, in connection with all the other evidences in the case, but you are not bound to act upon them to the entire exclusion of other testimony. Taking into consideration these opinions, and giving them just weight, the accused was or was not of sound mind, yielding her the benefit of a reasonable doubt, if such arises from the evidence." The tendency of this instruction is to withdraw from the jury's consideration, in determining the issue of sanity, all evidence, other than the opinions of the experts. Jurors are not necessarily bound by the opinion of experts; such opinions are but evidence to assist the jury in finding an essential fact; they should not be arbitrarily or capriciously rejected, but the other evidence may be of such a character and of such convincing weight that the jury may accept it in preference to the opinions.

Mr. Justice Curtis, in his charge to the jury in *United States v. McGlue*, 1 Curtis (U. S. C. C.) 1, 10, in a

prosecution for felonious homicide on the high seas, well said: "But these opinions, though proper for your respectful consideration, and entitled to have, in your hands, all that weight which reasonably and justly belong to them, are nevertheless not binding on you, against your own judgment, but should be weighed, and, especially where they differ, compared by you, and such effect allowed to them as you think right; not forgetting, that on you alone rests the responsibility of a correct verdict." See, also, *Davis v. School District*, 84 Neb. 858. This instruction also might lead the jury to believe they should not give the accused the benefit of a reasonable doubt in considering whether she was of unsound mind, unless the evidence of the experts created that doubt.

Insanity is not an issue by itself to be passed on separately from the other issues in a criminal case, but is involved in the plea of not guilty. 2 Bishop, New Criminal Procedure, sec. 673. True, it is that the presumption of sanity, if not rebutted, sustains that issue in the state's favor, but if at any stage of the trial evidence is introduced, whether by the state or by the defense, tending to impair or weaken that presumption, then the state should not prevail, unless after a consideration of all of the evidence the jury find beyond a reasonable doubt that the accused at the time of the crime had mind and understanding sufficient to know and to understand that the alleged act was wrong. *Knights v. State*, 58 Neb. 225; *Davis v. United States*, 160 U. S. 469; *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162. In such a case a reasonable doubt may arise from a lack of evidence to prove that the accused was mentally responsible within the meaning of the law. It is true that in other instructions the court told the jury that, if after a consideration of all of the evidence they entertained a reasonable doubt of the defendant's guilt, they should acquit, and that, if they found that any of the material facts assumed in the

hypothetical questions to be true were not so, they might reject the opinions based thereon, yet the most that can in reason be said concerning their effect on instruction 23 is that the jury might not have been misled by it.

We have held that the giving of inconsistent and contradictory instructions with respect to a material issue is ordinarily prejudicial error, and we find nothing to take this case without the general rule. *Henry v. State*, 51 Neb. 149.

Since the case must again be tried, we think it proper to say that there is no testimony in this record to the effect that any witness's reputation for truth or veracity is bad in the neighborhood where he resides, and if on the next trial the proof shall be in the same condition it will be the part of prudence to eliminate that feature from the instructions. Neither do we discover any evidence that the accused was laboring under a delusion at the time she killed Churchill. We also think that instructions 30 and 31 should more clearly state the necessity for the state to prove that the accused was of sound mind within the meaning of the law.

Instruction numbered 7, if given, should be made more definite, so there can be no reason to say that the jury might find the accused guilty of murder in the first degree, if they found that the intention to kill and the killing were coincident in point of time.

The judgment of the district court, therefore, is reversed and the cause remanded for further proceedings.

REVERSED.

REESE, O. J., FAWCETT and SEDGWICK, JJ., concurring.

We think that the majority opinion is right, also that the instruction first quoted in the opinion and the thirtieth and thirty-first instructions given by the court were erroneous and prejudicial to the defendant. The jury were told that "when one person assaults another violently with a dangerous and deadly weapon, likely to

kill, not in self-defense, or in defense of habitation or property, and not in a sudden heat of passion or sudden quarrel, and the life of the person thus assaulted is actually destroyed in consequence of such assault. * * * such killing would be murder." Thus the court recited to the jury precisely the things which this defendant did, and tells the jury that such action "would be murder;" and so the defense of insanity was wholly eliminated. We think this would be prejudicial to the defendant, since her sole defense was insanity. The instruction is absolutely wrong and prejudicial in this case, because all of the circumstances of the killing are admitted, and there was no room for presumption to arise therefrom, and this instruction plainly tells them that the fact of the shooting raises the presumption that it was malicious; that that presumption is a legal presumption, and is so strong that under the existing facts the defendant is guilty of murder in the first degree. This decides for the jury the question of legal malice, which depends upon her sanity, which was the only question involved in the case. This instruction, there being no dispute about the facts accompanying the shooting, is prejudicially erroneous under the decisions in *Vollmer v. State*, 24 Neb. 838; *Lucas v. State*, 78 Neb. 454; *Kennison v. State*, 80 Neb. 688.

The thirtieth instruction given by the court is as follows: "In this case the jury will be warranted in convicting the defendant, Maggie Davis, of murder in the first degree, if you find the following facts from the evidence beyond a reasonable doubt: First. That Ira M. Churchill is dead, and that he died in the county of Cedar, state of Nebraska, on the 2d day of November, A. D. 1910. Second. That the said Ira M. Churchill died from the effect of the pistol-shot wound inflicted on him by the defendant in the manner and by the means specified in the information. Third. That the defendant without legal excuse inflicted the said wound upon the said Ira M. Churchill with the purpose and with the

intent to thereby kill him; and the said wound was so inflicted by the defendant upon the said Ira M. Churchill by her deliberate and premeditated malice. Fourth. That said wound was inflicted by defendant upon the said Ira M. Churchill in the county of Cedar, and state of Nebraska, on the 2d day of November, 1910, or at some time prior to his death. If you have so found these facts, it is your duty to find the defendant guilty of murder in the first degree." There was no question that plaintiff in error shot the deceased. That fact was not disputed. The defense presented was that at the time of the killing she was not of sane mind. It will be observed that this defense was wholly eliminated by the instruction. At the beginning of the instruction the jury were told that they would be warranted in convicting the accused of murder in the first degree, if they found the facts stated therein to have been proved beyond a reasonable doubt, and, at the close, they were informed that if they found these facts it was their duty to find the defendant guilty of murder in the first degree. This closed the door upon the only defense offered, for there is not one word in that instruction directing the jury that they must find beyond a reasonable doubt that the accused was sane at the time of the killing, which the law clearly requires, and which is the settled law of this state.

It may be said that the use of the words "without legal excuse," as found in the third clause of the instruction, was sufficient to cure the vice of the instruction. But such could not be the case, for in the twenty-first instruction the subject of "legal excuse" is presented, and the jury were informed that "the law recognizes no such rule in criminal law, popularly known as the 'unwritten law'; that, even if you believe from the evidence that the deceased, Ira M. Churchill, had wronged the defendant and deceived her, this would not afford her a *legal excuse* to take his life," provided she was able to distinguish right from wrong as to the particular act complained of. Here the jury were told that the fact she had been

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wronged furnished no "legal excuse" for killing the deceased. With this direction as to what constituted a "legal excuse," nothing would be more natural than that the jury should adopt as their guide this definition, and thus the defense of insanity would be entirely excluded. It is universally held by all courts that the giving of an erroneous instruction upon a material issue cannot be cured by other inconsistent instructions which correctly state the law. It is also a well-known rule that, if by an instruction an effort is made to cover the whole case, all the elements necessary to the commission of the crime must be included, or the instruction will be bad. It is also so well settled as to be elementary that instructions should be so formed as to be applicable to the evidence as presented in the case on trial, and to that evidence alone. The same vice occurs in the thirty-first instruction, which directs the jury to find the accused guilty of murder in the second degree, if they find that the killing was done without premeditation and deliberation.

We think these instructions were clearly erroneous, prejudicial, and constitute reversible error.

BARNES, J., dissenting.

I cannot concur in the majority opinion. As I read the bill of exceptions, the fact that the defendant actually formed the purpose to kill the deceased, Ira M. Churchill, and deliberated and premeditated upon it for a long time before she committed the offense, is clear; that thereafter she deliberately killed her victim by shooting him with a revolver, which she declared was purchased for that purpose. To such a state of facts the rule announced in *Lucas v. State*, 78 Neb. 454, has, to my mind, no application. It clearly appears that the only defense relied on by the accused was that of insanity, and upon that question the verdict of the jury was amply sustained by the evidence. In fact, I am unable to see how they could have arrived at a different conclusion. As I understand the majority opinion, the

reversal is predicated upon an alleged inconsistency in the charge to the jury, and a failure to mention the matter of insanity in one of the main paragraphs of the instructions. Upon those questions, it may be said that if each paragraph of the instructions is considered separately, and without reference to the other paragraphs, it is possible that they may appear to be slightly inconsistent; but when they are considered together they fairly state the law. It is an easy matter to select an isolated portion of a lengthy charge to the jury and find that, standing alone, it does not state the law. The whole charge must be considered together. Again, it is impossible to introduce qualifying phrases into every sentence containing the statement of a general legal proposition. If the instructions as a whole inform the jury what the law is with reference to a crime, and also give the defendant the benefit of a correct statement of the law regarding his defense, it is sufficient. The jury in this case were repeatedly told in varying phraseology that, if at the time of doing the act the accused was not of sound mind, she should be acquitted; and if the evidence whether she was sane or insane was evenly balanced, or if they entertained a reasonable doubt as to her sanity, she should be acquitted.

From reading the whole charge, it seems clear that the jury were not misled in any manner, and clearly understood that the instructions criticised were to be considered in connection with the other instructions given with reference to the defense of insanity. To believe otherwise is to presume that the jury were not composed of men of ordinary intelligence.

Where a judgment is based on a correct verdict, it should not be reversed, unless it appears that the instructions were clearly misleading. While the instructions in this case are not so clear and concise as they should have been, still I am unable to see how they could have resulted in any prejudice to the substantial rights of the accused.

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The record as a whole reflects a fair trial and a just verdict, and I am of opinion that the judgment should be affirmed.

LETTON, J., concurs in the foregoing dissent.

CHARLES F. DOLL ET AL., APPELLERS, V. BERTHA GETZSCHMANN ET AL., APPELLANTS.

FILED NOVEMBER 28, 1911. No. 16,991.

1. Vendor and Purchaser: CONSTRUCTION OF CONTRACT: INDORSEMENT ON NOTE. Where a vendor of real estate takes a series of notes for deferred payments, and at the time they are executed indorses one of the notes "paid" and surrenders it to the purchaser pursuant to the contract of purchase, the indorsement is a substantive part of the note.
2. Evidence: NOTES: INDORSEMENT: PAROL EVIDENCE. Facts showing that an indorsement on a note when executed is a substantive part of the note may be proved by parol evidence.

APPEAL from the district court for Douglas county:
GEORGE A. DAY, JUDGE. *Reversed with directions.*

Charles W. Haller, for appellants.

George W. Shields, contra.

ROSE, J.

This is a suit by vendors to foreclose a contract for the sale of real estate. Defendants are the purchasers. According to the petition, the purchase price was \$6,005, defendants agreeing to pay \$5 down and \$1,000 annually for six years with interest on the entire debt, each of the six deferred payments being evidenced by a separate promissory note executed by the purchasers. The contract is set out in the petition, and refers to the notes in these words: "Said sum of \$6,000 is further evidenced by six

certain promissory notes each bearing even date herewith and payable on or before one, two, three, four, five and six years after date, respectively." The first note was paid, and defendants are resisting payment of the last one only, the entire debt having been declared due for nonpayment of interest. Charles F. Doll and Amelia Doll, plaintiffs, are named in the contract as vendors, but August Doll acted for them in selling the real estate and in making the contract. The answer of defendants contains the following averments:

"(3) On or about June 11, 1907, the date of the contract set out in the petition, said August Doll and defendants had numerous matters of dispute and controversy growing out of their prior dealings just referred to, some pending in suit brought in the name of said Charles F. Doll; and said August Doll, always acting with the fullest authority and consent of said Charles F. Doll, made and effected with the defendants a compromise or settlement according to which the defendants were to pay, in full for all the lots described in the contract set out in the petition, a balance of \$5,000 only in yearly payments of \$1,000 each. Said August Doll insisted, however, that the contract should be drawn for \$6,005, as set out in the petition, accompanied by six notes, and that the \$1,000 note last falling due according to its terms should be kept and not delivered by the defendants and he would mark and indorse it paid.

"(4) Thereupon, the defendants and said August Doll carried out said arrangement, the one \$1,000 note not being delivered, and being marked and indorsed by said August Doll: 'Paid July 12, 1907. August Doll.'"

Allegations of new matter in the answer are denied by a reply containing this plea: "These plaintiffs further deny the allegations and each of them in paragraph three in said answer, except that these plaintiffs admit that the said August Doll was acting for them as their agent in and about the transfer of and sale of said property to the defendants, but the plaintiffs allege the fact to be that

the said August Doll never had any authority to sell said land for less than the sum of \$6,005, and never had any authority to give to the said defendants or either of them any credit upon said sale except for actual cash; and the said August Doll had no authority to make any such contract with the said defendants as is set forth in said third paragraph of said answer."

After a full hearing, the trial court found that "August Doll, as agent of said Charles F. Doll, made with the defendants the agreement set out in paragraphs three and four of the said answer, and that the \$1,000 promissory note last maturing, to wit, on July 1, 1913, was pursuant to said agreement never delivered by defendants, and was pursuant to said agreement indorsed by said August Doll: 'Paid July 12, 1907. August Doll.' The court finds as a matter of law, however, that all evidence admitted to prove the agreement set out in paragraphs three and four of the said answer was incompetent, irrelevant and immaterial, for the reason that said evidence tended to vary and modify a written contract." From a decree foreclosing plaintiffs' lien, including the note in controversy, defendants have appealed.

Under the proofs admitted in evidence by the trial court, the findings of fact quoted are clearly correct. The conclusions of law, however, cannot be adopted. The reply admits that August Doll acted for plaintiffs in selling the real estate and in making the contract pleaded in the petition. That contract refers directly to the notes and they are all parts of one transaction. The last note of the series was indorsed "paid." The indorsement was made at the time of the execution of the note, which was never in fact delivered. The indorsement was an inducement to defendants to sign the contract of sale. Plaintiffs' agent made the indorsement for the purpose of selling his principals' property. It was clearly a part of the contract and note. The parties had a right to transact business in that manner though it is not the usual method. The general rule is that a memorandum or indorsement

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on the back of a note when it is executed is a substantive part of the contract. *Kurth v. Farmers & Merchants State Bank*, 77 Kan. 475, 15 L. R. A. n. s. 612; *Grimison v. Russell*, 14 Neb. 521; *Polo Mfg. Co. v. Parr*, 8 Neb. 379; *Bay v. Shrader*, 50 Miss. 326; *Kalamazoo Nat. Bank v. Clark*, 52 Mo. App. 593; *Hughes v. Fisher*, 10 Colo. 383. The principle was stated in an early Massachusetts case as follows: "Where the payee of a note, at the time it was signed by the maker, and as a part of the same transaction, indorsed thereon a promise not to compel payment thereof, but to receive the amount when convenient for the maker to pay it, it was held that the indorsement must be taken as part of the instrument, and that the payee could never maintain an action thereon." *Barnard v. Cushing*, 45 Mass. 230. The doctrine is the same, though the indorsement is unsigned. *Hartley v. Wilkinson*, 4 Camp. (Eng.) 127; *Leeds v. Lancashire*, 2 Camp. (Eng.) 205. By signing the indorsement, August Doll did not invalidate it or detach it from the instrument of which it was a part. It was under the contract made by the agent for his principals that the note in controversy was marked "paid." They cannot be allowed to ratify the part beneficial to them and repudiate the rest. The agent conducted for plaintiffs the negotiations resulting in the contract of purchase. To consummate the deal, he marked the last note "paid," and allowed the makers to retain it. His principals, without possession of the sixth note, are now seeking to foreclose the contract of which it is a part. They have thus ratified the contract in its entirety, and are chargeable with the means employed by their agent to induce defendants to sign it, including the indorsement. Parol evidence is admissible to show that an indorsement on the back of a note was there when the note was executed. *Blake v. Coleman*, 22 Wis. 415. The trial court properly admitted proof of facts showing that the indorsement was part of the note.

It follows that the vendor's lien does not include the amount of the note marked "paid," and that defendants

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are not liable for the payment thereof. The judgment is therefore reversed and the cause remanded to the district court, with directions to enter a decree of foreclosure protecting defendants' rights as fixed by the indorsement on the note in controversy.

REVERSED.

N. J. MAXWELL ET AL., APPELLANTS, V. JAMES REISDORF,
APPELLEE.

FILED NOVEMBER 28, 1911. No. 17,312.

1. **Intoxicating Liquors: LICENSES: RECORDS OF VILLAGE BOARD.** The record of a village board granting a license to sell intoxicating liquors must show all of the jurisdictional facts.
2. ———: ———: **PETITION.** The filing of a petition signed by the number of resident freeholders required by statute is essential to a village board's jurisdiction to grant a license for the sale of intoxicating liquors.
3. ———: ———: **NOTICE.** Two weeks' notice of the filing of a petition for a license to sell intoxicating liquors is essential to the licensing board's jurisdiction to grant a license.
4. ———: ———: ———. A new notice must be given before a valid license can be granted, where the names of the full number of qualified petitioners first appear on the petition at the time set for the hearing of a remonstrance.

APPEAL from the district court for Platte county:
GEORGE H. THOMAS, JUDGE. *Reversed with directions.*

A. M. Post and R. P. Drake, for appellants.

Albert & Wagner, contra.

ROSE, J.

The validity of a license to sell intoxicating liquors in the village of Creston is the subject of the controversy. James Reisdorf is licensee. N. J. Maxwell and others are

remonstrators. After the license had been granted, remonstrators presented the record of the village board to the district court, and there asked to have the license revoked. From an adverse judgment they have appealed to this court.

The license is challenged on the ground that licensee failed to give legal notice of the filing of the petition on which the village board acted. The facts material to the determination of this question may be summarized as follows: For the purposes of this appeal, a petition signed by 30 resident freeholders was essential to the jurisdiction of the board. When the petition was filed with the city clerk, April 14, 1911, it bore 30 names, but only 29 genuine signatures, the use of one of the names having been unauthorized. Beginning with that date notice of the application was published for three consecutive weeks. April 26, 1911, the city clerk appended to the petition the following note: "Comes now Louise Lueschen, whose name appears as one of the petitioners on petition of James Reisdorf for liquor license, and asks that her name be taken from said petition, as she herself had not signed such petition, nor authorized any one else to sign her name to such petition." At a meeting of the board May 1, 1911, the remonstrance was read. It is in this form: "We, the undersigned, hereby remonstrate against the issuing of a liquor license to one James Reisdorf, on petition now on file with the village clerk of said village. The reason we object to the issuing of such license is that there are not enough signatures of legal resident freeholders on said petition." The hearing of the remonstrance was set for May 2, 1911, when the board allowed three additional petitioners to sign the petition, and directed the clerk to issue the license; the record of the proceedings, showing, among other things: "It is admitted to the board that the signature of Louise Lueschen on said petition is not her signature, and that she did not authorize any one to sign her name to said petition." It thus appears that, when the petition was

filed and the notice published, it bore the authorized signatures of 29 qualified petitioners only, and remained in that condition until the time set for the hearing of the remonstrance. No further notice of the application was given after the number of authorized signatures had been increased.

On this record remonstrators contend: The petition as originally filed was not a legal one. It bore the names of 29 petitioners only, and was wholly insufficient for jurisdictional purposes. If it was made sufficient by the additional signatures, it became so for the first time May 2, 1911. Legal notice of the filing of the petition not having been published after it was made sufficient by additional petitioners, the board issued the license without jurisdiction, and its action is for that reason void.

Was the petition as originally filed sufficient to give the village board jurisdiction over the matter of granting a license? Was the notice of the filing of the petition containing the names of 29 petitioners only sufficient to meet the requirements of the statute? The law prohibits the sale of intoxicating liquors, except upon statutory conditions. Those conditions cannot lawfully be relaxed or modified by licensing boards or courts. Whether they impose a hardship upon an applicant for a license is not an executive or a judicial question. To procure a valid license, an applicant must comply with such conditions, and it is not within the power of those who administer the law to excuse him from doing so. The language of the law is: "No action shall be taken upon said application until at least two weeks' notice of the filing of the same has been given by publication." Comp. St. 1911, ch. 50, sec. 2. The terms, "application" and "the filing of the same" refer to the statutory petition signed by at least 30 resident freeholders, and do not apply to a petition bearing 29 signatures only. For the purpose of giving notice, the statute makes no reference to a petition which appears on its face to have 30 petitioners, and neither the licensing board nor the court

has any authority to interpolate such a provision. The statute requires the applicant to file the petition and to give the notice. The requirements of both are definitely stated. Where a village board issues a license, its record must show all of the jurisdictional facts. One of those facts is the filing of a petition signed by the requisite number of freeholders. It is not shown by the record of the proceedings before the board that there are less than 60 resident freeholders in the village. There is as good reason for asserting that a petition, to which all the names were signed without authority, is sufficient for the purpose of publication, though the use of such names has never been ratified, as there is for the contention that 29 genuine signatures and one unauthorized name meet the requirements of the statute, if they happen to appear upon the face of the petition. Prior to May 2, 1911, the board did not have before it the petition contemplated by statute. Within the meaning of the law, the document filed by the applicant April 14, 1911, was not a petition or application, and the filing thereof could not be made the basis of a legal notice. Not having had a sufficient petition until May 2, 1911, two weeks' notice of the filing thereof was essential to confer jurisdiction on the board to issue a license. *Zielke v. State*, 42 Neb. 750; *Pisar v. State*, 56 Neb. 455; *Pelton v. Drummond*, 21 Neb. 492.

Licensee, however, takes a different view of the law, and argues that the filing of the petition, the giving of the notice and the signing of the additional names with the permission of the board meet the requirements of the statute and make further publication unnecessary. To sustain this point he cites *Livingston v. Corey*, 33 Neb. 366, and *Thompson v. Eagan*, 70 Neb. 169. In the first of these cases the writer of the opinion was particular to make it clear that the petition as originally filed was signed by the requisite number of qualified petitioners. In the last of the cases cited by licensee the first is followed, and for the reason stated neither is in point.

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For want of legal notice of the filing of the petition on which the board acted, the license was granted without jurisdiction, and is therefore void.

It follows that the judgment is reversed and the cause remanded to the district court, with a direction to cancel the license.

REVERSED.

SEDGWICK, J., dissenting.

The licensing board is not a court. It acts in an administrative and only quasi-judicial capacity. It is necessary for it to take some ministerial and administrative actions in order to get the matter ready for hearing. In every case in which this court has spoken of the jurisdiction of this board, it has plainly referred to its power to grant the license, and not to its method of obtaining, as we would say of a court, jurisdiction of the subject matter. The law does not require the board to give notice that there will be an application for license heard at a certain time. The party himself generally gives the notice without any action of the board whatever. The statute (Comp. St. 1911, ch. 50, sec. 2) provides that no action shall be taken upon said application until notice is given, and that is all the limitation that the law makes. There is no provision of the statute that can by any construction be made to mean that the board must give notice of the application, and that before it gives such notice it must be shown that it has genuine signatures on the petition. There is nothing of that kind in the law. In *State v. Weber*, 20 Neb. 467, the court said: "There was a petition before the board which on its face complied with such provision. In the absence of objection made within the time limited by other provisions of the same section, it would probably be sufficient." See, also, *Zielke v. State*, 42 Neb. 750. I am not aware that there has ever been a decision to the contrary. If the petition on its face appears to be all right and the board acts thereon without objection, the petition is sufficient. Louise Leuschen's name was upon the peti-

tion. She asked that her name be taken from the petition, and stated that she had not authorized any one to sign her name. It was admitted upon the record by the parties that she did not authorize any one to sign her name. For the purpose of withdrawing her name from the petition, it was immaterial whether she did or not, as she had a right to withdraw her name, even if she had signed it herself; but the question whether she authorized someone to sign her name or not is not a question of forgery. The law would presume that the person who signed her name supposed he had authority to do so, and that if he did not it was an innocent mistake. Whether he had or not was a question of fact, and if she had not requested her name to be withdrawn, and it had been objected by the remonstrants that her signature was unauthorized, it would have presented a question of fact for the board to have determined. Again, if she knew that her name was upon the petition, she would be bound by it unless she raised objection; that is, it was her signature until she objected, and the board would be justified in so considering it. If we apply the same rule to these proceedings that we would to ordinary proceedings, we would say that the purpose of the statute was to give all parties interested an opportunity to be heard upon an application for the license, and that this was the reason for requiring notice, and that notice that an application would be heard at a specified time was a full compliance with the statute whether some names should afterwards be withdrawn from the petition and others substituted in their places or not. The board would not have power (jurisdiction) to grant a license until a petition was before it, as the law requires, and in this case there was such petition before it, and it had power to grant the license. There seems to be no reason for supposing that this is a question of jurisdiction, and that all the signatures on the petition must be genuine signatures when the applicant publishes his notice. The board has no power even to decide in what newspaper

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the notice shall be published. This court has so decided. *Feil v. Kitchen Bros. Hotel Co.*, 57 Neb. 22. There is no reason why an application for license should not be treated, by the courts at least, the same as any other application before an administrative body. It is not the duty of the court to add technical restrictions any more than in any other proceeding. It is for the legislature, acting under the force of public opinion, to add additional technical restrictions if it is thought advisable to do so.

The majority opinion does not say anything about the above quotation from *State v. Weber*, 20 Neb. 467, one of the earlier cases and a leading case, a case that has been many times cited by this court and supposed to be followed as a precedent. In *Livingston v. Corey*, 33 Neb. 366, the names of three disqualified persons were upon the petition. If these were excluded, there remained 31. Three other petitioners withdrew their names, leaving 28. It does not appear when they withdrew their names. The indication is that they withdrew them before the publication of the notice was completed. It will seem quite clear from the opinion that this was the fact, although it is not definitely stated. If that was the case, the notice was not published while there was a valid petition before the board, and under the holding in the case at bar, as soon as these three men withdrew their names from the petition, the board was without jurisdiction. When these three men had withdrawn their names from the petition and before others were added, the board was without power to grant the license. There was no question of jurisdiction as we ordinarily apply the term to courts. It had power to allow others to sign the petition if desired, and allow still others to withdraw if they desired; in other words, it had power to make preliminary arrangements for a fair hearing, but no power to grant the license until the petition was completed. The court in that case said: "After a petition for a liquor license was filed with the city clerk and

notice thereof was given, the city council permitted other freeholders to sign the petition. *Held*, No error, and that it was not necessary to republish the notice after such amendment." In the case at bar, unless we overrule the proposition in *State v. Weber, supra*, the petition was sufficient until the objection was made that Louise Leuschen's name should not be counted. Until that time, the publication of the notice being complete, the board had power to grant the license. Undoubtedly the petitioner may appear before the board and withdraw his name from the petition or show that his signature was unauthorized, and so prevent the board from granting the license, unless the petition is amended, but the petitioners cannot play fast and loose with the power of the board to allow amendments, in that way. The notice was published while the board had the petition before it with Louise Leuschen's name and without the question of fact determined as to whether or not she had authorized it; there having been no such objection made and no such question raised. Notice published under such circumstances is a good publication; and the effect of it is not destroyed by the substitution of one name for another upon the petition.

Under the holding of the majority opinion, the board is entirely without jurisdiction to take any action whatever, and the applicant has no jurisdiction to publish notice of the application, if it can afterwards be shown that the signatures to the petition, or a sufficient number of them (in this case one), was placed upon the petition without authority. If the person who placed the name upon the petition acted in perfectly good faith, supposing he was duly authorized, and upon due publication of the notice no objection is made to the petition, the result is the same, there was no jurisdiction and the whole proceedings are void. The consequences are remarkable. After the applicant has received his license and has conducted his business legally and properly, as he supposes, one of the petitioners raises the question whether his sig-

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nature was duly authorized. The licensee is prosecuted, and his defense depends upon being able to show that the signature to the petition was authorized. If not, he has no license, and is guilty. The decision in *State v. Weber* and *Zielke v. State*, *supra*, if followed, would save us from such an absurdity.

STATE, EX REL. JOHN J. G. GRAHAM, APPELLEE, v. ALCI-
NOUS T. BRATTON, APPELLANT.

FILED NOVEMBER 28, 1911. No. 17,385.

1. **Statutes: REPEAL.** An act to amend subdivision 27, sec. 48, ch. 13, art. III, Comp. St. 1909, and repealing said section as it had previously existed, was passed with an emergency clause and approved April 7, 1911 (laws 1911, ch. 13.) Three days later an act to amend the same section, under the designation of section 8573 of Cobbey's Annotated Statutes, 1909, was passed with an emergency clause and approved (laws 1911, ch. 14). The repealing clause in the later act repealed the section sought to be amended by both acts, "as it now exists." *Held*, That the later act repealed the section as amended by the former act.
2. ———: **CONSTRUCTION.** Where a statute is clear and unambiguous in its terms, it is the duty of the court, in construing it, to give the language used by the legislature its plain and ordinary meaning.
3. ———: ———: **PROVINCE OF COURT.** It is not within the province of the court to set aside, or nullify by construction, an act of the legislature which is free from ambiguity, and clear and explicit in its terms, upon the ground that to do so would appear to be equitable; nor upon the theory that, in the judgment of the court, the legislature made a mistake and did not intend to do that which its language clearly imports.

APPEAL from the district court for Adams county:
HARRY S. DUNGAN, JUDGE. *Reversed and dismissed.*

John M. Ragan, for appellant.

Tibbets, Morey & Fuller, contra.

FAWCETT, J.

We have in this state two different statutes; one published by Mr. Wheeler and known as "Compiled Statutes of Nebraska," and the other edited by the late Judge Cobbey, and generally known as "Cobbey's Annotated Statutes of Nebraska." In the introduction of bills proposing amendments to the statutes, some members of the legislature refer to the Compiled and others to the Annotated Statutes. In 1909 the section of the statute in controversy here appeared in the Compiled Statutes as subdivision 27, sec. 48, ch. 13, art. III, and in Cobbey's Annotated Statutes as section 8573. On February 17, 1911, senate file No. 294 was introduced and read the first time. This bill, which will hereinafter be referred to as 294, was passed with an emergency clause and approved April 7, 1911. On February 6, 1911, senate file No. 204 was introduced and read the first time. This bill, which will hereinafter be designated as 204, was passed with an emergency clause and approved April 10, 1911. The sole question involved here is: Was 294 repealed by 204? It will be observed that both bills sought to amend the same section. The section sought to be amended had theretofore applied only to sewer districts in cities having more than 5,000 and less than 25,000 inhabitants. The amendment proposed by 294 was to make the section also apply to water districts. The amendment proposed by 204 was designed simply to change the rate of interest upon instalments of special taxes from 7 to 5 per cent. Section 2 of 294 provided: "Said subdivision 27 of section 48, chapter 13, article 3, Compiled Statutes of Nebraska (1909) (Ann. St., sec. 8753) be and the same is hereby repealed." It will be seen that the adoption and approval of 294, with an emergency clause, on April 7, with the repealing section above set out, operated as a repeal of section 8573, Cobbey's Annotated Statutes, so that the same no longer existed as it appeared in the statutes of 1909, but thereafter existed

as amended by 294. Section 2 of 204 provided: "Said section 8573 of Cobbey's Annotated Statutes of Nebraska for the year 1909 (Comp. St., ch. 13, art. III, sec. 48, subd. 27) as it now exists is hereby repealed."

Some time after 204 became effective, the relator and others petitioned the mayor and council of the city of Hastings to create a water district, under the provisions of 294. A water district was created, and the city clerk ordered to advertise for bids for furnishing material and labor for the construction of the proposed improvements. The clerk, under the advice of the city attorney, refused to so advertise. The city attorney based his advice upon the ground that 294 had been repealed by 204. The present action in mandamus was then instituted by relator, and upon hearing the district court sustained 294, and ordered that a peremptory writ issue, commanding the clerk to proceed in accordance with the commands of the mayor and city council. The respondent, the city clerk, appeals.

It is argued that section 2 of 204, in repealing section 8573, Cobbey's Annotated Statutes, referred to that section as it appeared at the time of the introduction of 204 on February 6. If that construction were put upon this repealing section, it would render it meaningless, for the reason that at the time it was passed and approved it would have had nothing to operate upon, as section 8573, as it appeared on February 6, had been repealed by 294 on April 7. We think the rule is too well established to require citation of authorities that, where a statute is plain and unambiguous in its language, it is the duty of the court in construing it to give the language used by the legislature its plain and ordinary meaning. The language used in the repealing section of 204 is plain and free from any ambiguity. Giving it its plain and ordinary meaning, it did not assume to repeal section 8573 of Cobbey's Annotated Statutes, as the same appeared on February 6, but, on the contrary, it plainly and explicitly repealed said section "as it now exists";

that is to say, as it then existed upon the day and hour when 204 was passed and approved. Neither amendment has any application whatever to the other. Both might have been included in one bill, as they do not in any manner conflict; or, at the time of its passage, 204, by an amendment setting out the section as it then existed—that is to say, as it had been amended by 294—would have accomplished what it would seem the legislature intended to do, viz., amend the section in the two particulars named.

The relator contends, in effect, that we should either hold, in harmony with *Hall v. Craig*, 125 Ind. 523, that the two acts of the legislature referred to should be considered *in pari materia*, and both acts sustained, or that 204 is void, for the reason that it attempted to amend a section of the statute which had already been repealed by 294. The respondent contends that the repealing clause in 204, which recites that section 8573 of Cobbe's Annotated Statutes of Nebraska for the year 1909 "as it now exists is hereby repealed," means exactly what it says; that there is no ambiguity in the language used; that section 8573, as it then existed, was as it had been amended three days prior thereto by 294. While the equities of the case seem to be with the relator, it is not within our power to set aside or amend by construction an act of the legislature which is free from all ambiguity and clear and explicit in its terms, simply because to do so would appear to be equitable; nor can we do so upon the theory that, in our judgment, the legislature made a mistake and did not intend to do that which its language clearly imports. To adopt such a course would be establishing a dangerous precedent. If the legislature has blundered, it is simply proof of its fallibility, and it is for it to make the correction. The court sometimes blunders, but, when it does, it is for the court to correct the same. We have no more right to correct the mistakes of the legislature than it would have to correct ours. In the present case, therefore,

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we must hold that, by the passage of 204, the legislature repealed 294, and that whether such repeal was intentional or by mistake is immaterial here. We do not think this holding will leave the city in the hopeless condition pictured by counsel at the bar. Our legislature meets with at least sufficient frequency. It may be appealed to at its next session, and we have no doubt it will then adjust the matter in accordance with its own sound judgment. Moreover, we think this case is fairly ruled by *State v. Babcock*, 23 Neb. 128.

The judgment of the district court is reversed and the action dismissed at relator's costs.

REVERSED AND DISMISSED.

MICHAEL H. MCCARTHY, APPELLEE, v. EDMOND H.
BENEDICT ET AL., APPELLANTS.

FILED NOVEMBER 28, 1911. No. 16,421.

1. **Mortgages: FORECLOSURE: FRAUD.** An assignee of a mortgage which has not been recorded, who brings an action to foreclose the same after a decree has been entered against the original mortgagee canceling the mortgage in an action to which the assignee was not a party, is not necessarily chargeable with fraud in so doing.
2. **Judgment: VALIDITY: PETITION.** The fact that a petition in district court fails to state a cause of action as against a general demurrer will not render the judgment of the court thereon void for want of jurisdiction, if it shows that the plaintiff has or claims a cause of action which is so identified in the petition as to enable the court to determine whether it is of such a nature as to be within the jurisdiction of the court.
3. **Trial: STIPULATIONS: APPEAL: REHEARING.** When stipulations of fact in an action are improvidently made by mistake of the parties, the court has discretion to relieve the parties from the consequences thereof. The court cannot limit the right of the parties in a civil action to dispose of their interests as they see fit, and when, after issue joined, they agree upon the facts that

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shall be submitted to the court for its judgment, and submit the case to the trial court thereon, and again upon appeal submit the cause to this court upon the same record, no attempt having been made to correct the stipulation, this court will ordinarily upon motion for rehearing consider such stipulation as containing the true facts in the case for the purpose of determining the motion.

4. **Quieting Title: DECREE: RECORDING ACT.** The party obtaining a decree quieting title to real estate may cause an exemplification of that decree to be recorded in the office of register of deeds, and, if he fails to do so, he cannot claim the benefits of the recording act as against one whose instrument of title is first recorded.

OPINION on motion for rehearing of case reported in 89 Neb. 293. *Rehearing denied.*

SEDGWICK, J.

A statement of the case may be found in the former opinion of this court in 89 Neb. 293. A motion for rehearing was filed accompanied by brief, and argument was had upon the motion.

1. It is stated in the brief that this action is predicated upon the fraud of the defendant Benedict. We do not so regard it. The defendant brought his action in the district court to foreclose the mortgage which he claimed to own by virtue of an assignment from the original mortgagee. If his rights as assignee of the mortgage were not barred by the prior action to quiet title, he was entitled to a decree of foreclosure. He began his foreclosure proceedings, making the parties in whose name the title appears of record defendants, and, if the mortgage which he held by assignment was a lien upon the land, he cannot be charged with fraud in attempting to assert that lien.

2. In our former opinion it was said that, if the district court acquired jurisdiction over the parties to the suit (to quiet title), the decree would be binding and final as to them, "provided the petition stated a cause of action." It is argued strenuously in the brief that the decree would be binding whether the petition

stated a cause of action or not. This contention is immaterial in this case because the decree to quiet title is in the opinion assumed to be binding upon the parties to that decree, and, because the defendant in the case at bar was not a party to that action, the decree therein is held not to bar his action to foreclose the mortgage. We might, however, suggest that it was not intended to say in the opinion that a petition, in order to give the court jurisdiction, must state a cause of action as against a general demurrer or motion, but it must state sufficient at least to show that the plaintiff has or claims a cause of action which is sufficiently identified in the petition to enable the court to determine whether it has jurisdiction of such a proceeding.

3. The plaintiff now contends that we erred in our former opinion in considering the stipulation of facts upon which the case was tried and submitted in the court below, and in not taking judicial notice that some of the facts stipulated by the parties are inconsistent with the record of this court in another action in which these parties were interested and which involved the same subject matter. There is no doubt that, when stipulations of fact in an action are improvidently made by mistake of the parties, the court has discretion to relieve the parties from the consequences thereof. In such case the parties should act promptly and call the attention of the trial court to the mistake of fact in the stipulation, and, when that mistake is clearly found with a proper showing of diligence, the courts generally correct such mistake. The parties have a right to dispose of their interest as they see fit, and when, after the issues are joined in the case, they agree upon the facts that shall be submitted to the court for its judgment, and make that agreement a part of the record in the case, and so submit the case to the trial court for its decision, they ought ordinarily to be bound by the decision that is made in accordance with those facts. If afterwards, without making any attempt to correct

their stipulation of facts, they bring their case to this court upon appeal and again submit the case upon the same stipulation of facts, they cannot complain of a decision that is made in accordance with that stipulation.

4. The final and most important question presented in this motion and brief is as to the rights of the assignee of a mortgage whose assignment is not recorded. It is held in our former opinion that a decree in an action to quiet title, in which the original mortgagee was a party defendant, would not be binding upon the holder of a note and mortgage by assignment "unless he were made a party to the suit and jurisdiction obtained over him." Upon further consideration of the matter we are satisfied that this holding is right in this case. Our recording act has been many times construed by this court, and it has been uniformly held that instruments affecting real estate that are required to be recorded are void as to subsequent purchasers in good faith without notice "whose deeds, mortgages, and other instruments, shall be first recorded." Comp. St. 1911, ch. 73, sec. 16. One who seeks to bar outstanding interests in real estate that are not recorded must himself comply with the recording act, and, unless he records evidence of title, he cannot avail himself of the provisions of the act. This would appear to apply as well to one whose interest in real estate is evidenced by a judgment or decree of court. Comp. St. 1911, ch. 73, sec. 23: "Any exemplification of any decree, or judgment in partition on final decree in chancery affecting real estate, may in like manner be recorded in the office of the register of deeds in any county in which any real estate described therein may be situated." It does not appear that any exemplification of the decree in the action to quiet title was recorded in the office of the register of deeds before the defendant's assignment of his mortgage was recorded, and therefore this plaintiff is not in a position to avail himself of the provisions of the recording act as against the assignee of the

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mortgage who was not a party to the action to quiet title.

For these reasons, the motion for rehearing is

OVERRULED.

WILHELM FLEGE V. STATE OF NEBRASKA.

FILED NOVEMBER 28, 1911. No. 17,136.

1. **Evidence: SUFFICIENCY.** Some of the evidence in the case is referred to in the opinion in the discussion of the errors complained of, but the objection that the evidence is not sufficient to support the verdict is not determined, it appearing that another trial will be necessary.
2. **Criminal Law: INSTRUCTIONS: APPLICABILITY.** The instructions of the court should be applicable to the precise question being tried. If an instruction is given defining what may generally be considered as a sufficient motive for crime, its application to the case in hand should be explained.
3. ———: ———: **ASSUMPTION OF FACTS.** In a prosecution for murder, when it is proved without doubt that a homicide was committed by pistol-shot wounds, an instruction which refers to the cause of the death of the deceased as "the pistol-shot wounds inflicted by the defendant" is incorrect, as assuming that the defendant inflicted the wounds.
4. ———: ———: **MALICE: QUESTION FOR JURY.** In a prosecution for murder, when the circumstances of the killing are all established by the evidence, it is erroneous to instruct the jury that the law implies malice from such circumstances. It is for the jury to determine whether the act was purposely and maliciously done.
5. ———: ———: ———: **APPLICABILITY.** In such case, if the homicide was committed by shooting, there being no attempt to justify the shooting, but the question is whether the defendant committed the act, such an instruction as to the circumstances under which the law will imply malice has no application and may be misleading.
6. ———: ———: **REASONABLE DOUBT.** Instructions attempting to define "reasonable doubt," held erroneous and prejudicial.
7. ———: ———: **ALIBI: APPLICABILITY.** In a prosecution for murder, when the precise time that the murder was committed is in

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dispute, but there is no question as to the whereabouts of the defendant at any time, it is erroneous to instruct the jury that the defendant relies upon proof of alibi.

8. ———: ———: **QUESTIONS FOR COURT AND JURY: WITNESSES: CREDIBILITY.** If a witness upon a former hearing has testified to a different state of facts than those testified to by him at the trial, it is erroneous to instruct the jury that, if they are satisfied that such statements were made "through an honest fear of personal violence, such statements would not be the voluntary act of the witness and would not operate as impeaching statements." It is for the jury to determine whether the witness was actuated solely by an honest fear of personal violence, and whether there was sufficient apparent cause for such fear, and how much reliance could be placed upon his evidence in view of such contradictory statements.
9. ———: ———: **DEGREES OF HOMICIDE.** In a prosecution for murder in the first degree, it is not reversible error to define the different grades of homicide, including murder in the first degree, although that charge is afterwards withdrawn from the consideration of the jury and the cause submitted upon the charges of murder in the second degree and manslaughter only.
10. ———: ———: **GOOD CHARACTER: QUESTION FOR JURY.** A request for instruction that evidence of good character "may be relied upon to raise a doubt of his guilt sufficient to acquit him" is properly denied. It is true that good character counts for much in a prosecution for murder, but whether it should be relied upon in a given case to turn the scale in favor of defendant is a question for the jury.
11. ———: **PRESUMPTION OF INNOCENCE.** In a criminal prosecution, the presumption of innocence continues in favor of defendant through the trial until overcome by evidence establishing guilt beyond a reasonable doubt.
12. **Erroneous rulings of the court in excluding evidence are stated and considered in the opinion.**

ERROR to the district court for Dixon county: GUY T. GRAVES, JUDGE, *Reversed*.

J. J. McCarthy, Frank A. Berry and Frederick S. Berry, for plaintiff in error.

Grant G. Martin, Attorney General, Frank E. Edgerton and C. A. Kingsbury, contra.

SEDGWICK, J.

On the 30th day of June, 1910, Louise Flege was shot and killed at her home in Dixon county. She was then residing with, and keeping house for, her brother, the defendant, and he was afterwards charged with her murder. Upon trial in the district court for Dixon county he was found guilty of murder in the second degree, and has brought the record of the proceedings here for review by petition in error.

1. He insists that the evidence is not sufficient to justify his conviction. One Eichtenkamp, a young man of about 18 years of age, was working for the defendant, and had been living with the defendant and his sister for a little more than two months. He had been there for a short time in the preceding year. He continued to stay there for about three weeks after the murder, and about that time he told the officers that the defendant had committed the crime. He was the principal witness for the prosecution, and his testimony is substantially all of the evidence that there is in the record tending to prove the guilt of the defendant. Immediately after the murder this young man told a very different story. His evidence was taken under oath at the coroner's inquest, and he there testified to circumstances which, if true, would prove conclusively that the defendant is not guilty of the crime with which he is charged. He testified upon the trial that he was plowing corn on the defendant's farm during the forenoon of the day of the murder, and that the defendant was painting his automobile house, and that they both went to the house for dinner at about half past 11 o'clock. The deceased had prepared the meal, and they all sat down to dinner about 12 o'clock. After they had eaten their dinner, which he thought took about 20 or 30 minutes' time, he and the defendant smoked, and then took a nap, the defendant lying upon the couch and the witness lying upon the porch, near the front door.

While they were sleeping, which he thinks might have been 20 or 30 minutes, the defendant was awakened by his sister, and was told that the defendant's brother wanted to talk with the defendant at the telephone. It appears from the uncontradicted evidence that the defendant and his brother, Fred Flege, who lived on an adjoining farm, had contemplated going to town with the defendant's automobile, and that Fred at this time called for the defendant to ask him to go then. The deceased went to the telephone, and told Fred that the defendant was asleep, and was by him told to awaken the defendant and have him come to the telephone. This she did, and the defendant and Fred then completed their arrangements to go immediately to town. This young man further testified that, when the deceased awakened the defendant, he was awakened also, and that they immediately went out to the automobile. The defendant drove the machine up toward the house, and went into the house to make some preparations for his trip, telling the witness to put some water in the automobile. The witness put some water in the automobile, and then went to the barn, where his team was, intending to go to the field to plow corn. In his testimony at the coroner's inquest he testified that he went and got a milk pail with which to put the water in the automobile. This would have made it necessary for him to go to the house, as the milk pails were kept in the kitchen. If he had gone to the house, he would have undoubtedly known more about what took place there than he afterwards testified that he knew. In his testimony at the trial he said that he used the slop pail that was standing at the well to put the water in the automobile, and did not go to the house. According to his further testimony at the trial, while he was putting the water in the automobile, he heard some talk in the house between the defendant and the deceased. He could not understand anything that was being said, but testified that they were quarreling, and just as he got

to the barn he heard the defendant and his sister coming out of the house. The defendant was assaulting her at that time; she was walking backwards to get away from him, and the witness said he heard the deceased say: "Leave me alone, leave me alone. What did I do to you?" The witness went to them, and asked the defendant what he was going to do, and the defendant told him: "That is none of your business. You hurry up and get out of here." The witness then went back to the barn, and just as he arrived there he heard a shot and saw the deceased on her knees, the defendant before her, or a little to one side, with a revolver in his hand pointed at her. The witness then went on preparing his team to go to work and heard another shot. The deceased was then lying on the ground in the yard, and the witness saw the defendant leave her and drive away with his automobile. As the defendant passed the witness, he threatened the witness, and told him to keep still about it, and then drove on. It appears from the uncontradicted evidence that the defendant went immediately to the home of his brother Fred, arriving there soon after 1 o'clock, and that the two men went to town with the automobile, as they had arranged to do, and returned to Fred's place at about 4 o'clock in the afternoon. The defendant was a young man about 29 years of age. When he left his brother's place, he stopped at a neighbor's, and talked with the girls there. He took one of the girls, with whom he seems to have been somewhat interested, for a ride, and then arranged with them to wash his machine, which they had done on former occasions. He stayed there some little time, and then stopped in the field where some of his neighbors were at work, and invited the young men to spend the evening with him at his brother Fred's. He did not arrive home until about 6:30 o'clock. This witness testifies that immediately after the defendant left home that afternoon the witness went into the field to work. He saw the deceased lying in the yard. Hogs were

running loose in an adjoining yard, and the gate between the two yards was left open. At the preliminary examination he testified that he did not shut the gate to keep the hogs out from the deceased because he was afraid of the defendant. On the trial of the case he testified that the gate was broken and he couldn't shut it, and that when he came home the gate was still open, but the dog was in the gate keeping the hogs from going through. He further testified that soon after he went into the field he saw an acquaintance, and they had some conversation, in which it appears that the acquaintance asked him some questions about the deceased, and whether the witness liked her, etc. He testified that he told the acquaintance that he saw the deceased on the porch after the defendant went away, and that she was all right. The witness' home, where his father and mother and their younger children resided, was about two miles from the defendant's home. The witness testified that he was at home several times with his father's family after the murder, and they talked about the murder, but the witness never told them what he had seen, but told them circumstances tending to show that some one other than himself or the defendant was guilty of the crime. When the witness went home from his work in the evening of the murder, he saw the body of the deceased still lying in the yard, and went into the house to the telephone to call the defendant at his brother Fred's. The defendant was not there, but he (the witness) informed Fred that the deceased was lying in the yard, and asked him to come over, which Fred immediately did. Fred brought a neighbor with him, and soon after they arrived the defendant also arrived.

It was at first supposed that a tramp that had been seen in the neighborhood had committed the crime. The defendant and his brother employed a detective, and the defendant took the detective from place to place, as the detective dictated, searching for evidence as to who had committed the crime. After this had gone on for about

three weeks, and the sheriff and others interested in the matter were unable to find any satisfactory evidence as to who was the guilty party, the sheriff saw this witness, and told him that other officers were coming out there, and that something had to be done. The witness was then given to understand that the officers and others interested had reached the conclusion that either this witness or the defendant had committed the crime. The witness then for the first time declared that the defendant was guilty.

The evidence covers about 2,000 pages of the record. We have not attempted to state all of the circumstances tending to indicate who was the guilty party. An outline of the principal facts appears to be necessary to an understanding of the questions presented. The defendant had lived at this place since his infancy. Many respectable witnesses testified to his good character and correct life. There was an attempt made by the prosecution to show a motive for the crime of which the defendant was charged. A neighbor testified to a trifling conversation that took place some time before. The time and circumstances were not stated, and afterwards this evidence was stricken from the record. The evidence, then, in this record which is supposed to show a motive for this crime comes wholly from the witness Eichtenkamp. He testified that the deceased objected to the defendant using his automobile so much as he did. The evidence upon that point is very meager, and relates principally to the time when the defendant went into the house on the day of this murder to prepare for his trip with his brother. The witness did not hear the conversation, but he appears to have inferred that they were quarreling about the defendant's leaving his work to go to town with his automobile. The witness also testified to a former occasion when the deceased told the defendant that the house was on fire, and they went out and found that the chimney was burning out, and the defendant, he says, made some severe remarks about

the women folks burning up houses. This, it is thought, tends to show that the defendant and the deceased did not live peaceably together. The defendant's two brothers and his sister and others testify that the relations between the defendant and the deceased were always pleasant, and that there was never any difficulty between them. If there was any motive for the defendant to commit this crime, it was anger caused by the remarks of his sister during the few minutes that the defendant was in the house immediately before the crime was committed. Unless the defendant or the witness Eichtenkamp committed this crime, there seems to be no explanation in the evidence as to how it occurred. Unfortunately it sometimes appears that, when a terrible crime like this is committed, it is impossible, for a time at least, to ascertain with any degree of certainty who is the guilty party. Under such circumstances all good citizens are aroused and inspired with a determination to punish the murderer. Their righteous zeal and earnestness may mislead them and divert their attention from the real criminal. The problem presented was whether this defendant, or the witness Eichtenkamp, or some unknown parties, committed the crime. It appears to have been difficult of solution. It must finally be resolved by a jury under the careful instructions of the court, using all of the safeguards furnished by the rules of law in such cases to guard against a wrongful conviction. Many things that took place during the course of this trial are complained of by the defendant. Some of the objections are quite technical and relate to matters apparently not prejudicial to the defendant, but some of them are substantial and require us to reverse the judgment.

2. After discussing the sufficiency of the evidence to support the verdict and judgment, the brief of the defendant calls attention to the instruction of the court as to the motive for the crime. That instruction was in the following words: "By motive is meant the force

behind the will which prompts the act. It may be love of gain, lust, selfish desire, hatred, sudden heat of passion, or any of the various causes which move the will power." There was no evidence in the record of the existence of any of these recited motives, unless it should be thought that the evidence tended to show, "sudden heat of passion." The instruction that we are considering correctly states an abstract proposition of law, and would not be prejudicial if given in connection with other instructions which pointed out its application to the case.

3. The twenty-seventh instruction given by the court to the jury was as follows: "If, however, the jury should find from the evidence beyond a reasonable doubt, first, that Louise Flege is dead, and that she died in the county of Dixon, state of Nebraska, on the 30th day of June, 1910; second, that said Louise Flege died from the effects of the pistol-shot wounds inflicted upon her by the defendant in the manner and by the means specified in the information; third, that the defendant without legal excuse and maliciously inflicted said wounds upon the said Louise Flege with the purpose and intent thereby to kill her, but without premeditation and deliberation; fourth, that said wounds were inflicted by the defendant upon the said Louise Flege in the county of Dixon, and state of Nebraska, on the 30th day of June, 1910, or at some time prior to her death, then it is your duty to find the defendant guilty of murder in the second degree." We think under the circumstances in this case this instruction, when considered with the whole charge to the jury, might have been misleading. There was but one question to be tried in this case. There was no doubt about the murder. The deceased was killed by two pistol-shot wounds, one entering the breast and another through the brain. The only question was whether the defendant fired those shots. There was no doubt that Louise Flege died from the effects of these shots. The second paragraph of the instruction

submits the question whether the deceased "died from the effects of the pistol-shot wounds inflicted upon her by the defendant." There was danger from this wording of the instruction that the jury would understand that the court considered and assumed that the wounds were inflicted by the defendant.

4. The fourteenth instruction given to the jury was as follows: "The jury are instructed that the law presumes that a person intends all the natural, probable and usual consequences of his act; that when one person assaults another violently with a dangerous and deadly weapon, likely to kill, not in self-defense or in defense of habitation or property, and not in a sudden heat of passion or sudden quarrel, and the life of the party thus assaulted is actually destroyed in consequence of such assault, then the legal and natural presumption is that death or great bodily injury was intended, and in such case the law implies malice and such killing would be murder." This instruction was erroneous and prejudicial in this case. There was no room for any implication of law as to malice. Such an instruction is sometimes proper, as when the killing by the person charged is admitted, and the question is as to whether it was intentionally or purposely done. If the fact of the killing is established and the circumstances surrounding the killing are not fully shown, so that the jury can judge from the circumstances whether it was intentional, the law will imply legal malice; but, where the circumstances of the killing are all established by evidence or are manifest and not controverted, the law raises no implication as to malice, but leaves that as a fact to be determined by the jury from all of the circumstances surrounding the killing. In this case the question was whether the defendant did the shooting. If he did, he was guilty. In such case an instruction of this kind is misleading and erroneous. It has been several times decided by this court that the giving of this instruction when not applicable to the facts in the case is such an

error as to require a reversal. *Vollmer v. State*, 24 Neb. 838; *Lucas v. State*, 78 Neb. 454; *Kennison v. State*, 80 Neb. 688.

5. Instructions 24 and 25 are as follows: "(24) The rule which clothes every one accused of crime with the presumption of innocence, and imposes upon the state the burden of establishing his guilt beyond a reasonable doubt, is not intended to aid any one, who is, in fact, guilty, to escape, but is a humane provision of the law intended, so far as human agencies can, to guard against the danger of an innocent person being unjustly punished. A doubt, to justify an acquittal, must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case; and, unless it is such that were the same kind of a doubt interposed in the graver transactions of life it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty. If after considering all the evidence you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt."

"(25) The court instructs the jury, as a matter of law, that the doubt which a juror is allowed to retain in his mind, and under which he should frame his verdict of not guilty, must always be a reasonable one. A doubt produced by undue sensibility in the mind of a juror, in view of the consequences of his verdict, is not a reasonable doubt, and a juror is not allowed to create sources of doubt by resorting to trivial and fanciful suppositions and remote conjectures as to possible state of fact differing from that established by the evidence. You are not at liberty to disbelieve as jurors, if, from the evidence, you believe as men. Your oath imposes upon you no obligation to doubt where no doubt would exist if no such oath had been administered. You are instructed that, if after a careful, impartial consideration of all the evidence in the case, you can say and feel that you have an abiding conviction of the guilt of the

defendant and are fully satisfied to a moral certainty of the truth of the charge made against him, then you are satisfied beyond a reasonable doubt."

Instruction No. 25 was prejudicially erroneous in this case. This court has had occasion more than once to criticise this instruction, and under some circumstances has held it to be so prejudicial as to require a reversal. *Brown v. State*, 88 Neb. 411. In *Blue v. State*, 86 Neb. 189, this court quoted from a decision of the supreme court of California, severely criticising some of the trial courts of that state who persisted in giving this instruction which has many times been declared erroneous, and in some cases is so prejudicial as to require a reversal.

The writer considers instruction No. 24 as also erroneous and prejudicial, especially in connection with No. 25. A jury in such a case ought not to be told that they must "justify an acquittal," or that they must find something in the case "to authorize a verdict of not guilty." It is not necessary, however, to repeat the views expressed in *Blue v. State, supra*, and in the opinion of the supreme court of California, therein referred to. The majority of this court, however, considers that instruction No. 24 is not prejudicially erroneous in this case.

6. The court instructed the jury that there was evidence tending to show an alibi, and describing the nature and effect of such evidence. It is objected that there was no evidence upon which to predicate such an instruction, and we think that the objection is well taken. The dispute was as to whether the defendant committed this act, and incidentally as to the time when the act was committed, but there was no dispute in the evidence as to the location of the defendant. It is plainly shown when he left his home and when he returned. There was no attempt to maintain that he was at any time in any different place than as alleged by the state. The instruction therefore has no application to the facts in the case. The danger is that by the

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giving of such instructions the attention of the jury will be diverted from the real issue, and that they may be led to suppose that in some respects at least the defense is fictitious.

7. The court instructed the jury that if they were satisfied from the evidence that a witness had made conflicting statements under oath, or otherwise, "through an honest fear of personal violence, such statements would not be the voluntary act of the witness and would not operate as impeaching statements." If the witness was actuated solely by an honest fear of personal violence when there was sufficient apparent cause for such fear, his statements under such circumstances might not be voluntary. The language of the instruction as given is not accurate and might have been misleading.

8. It is complained that the court stated in its instructions the elements of the crime of murder in the first degree, and then withdrew that charge from the consideration of the jury, and submitted only the charges of murder in the second degree and of manslaughter. We do not find that there was any error of the court in this instruction. Each of the three several degrees of homicide was correctly defined by the court, and then the jury were told that there was not sufficient evidence to convict of murder in the first degree. We do not see that the defendant could have been prejudiced by this action on the part of the court.

9. The coroner was a witness for the defense, and was asked this question: "Now, Doctor, assuming that Louise Flege was shot in the breast first, assuming that Louise Flege was on her knees after the first shot, would it have been possible for her to have fallen in the position in which you found her after receiving the second shot?" The question was objected to, and the court remarked: "It looks to me like a pretty thin slice of expert there, but you may answer." The witness said: "It would have been impossible." The evidence showed without contradiction that the shot in the breast passed through

the body in a downward course, and that the second shot entered just back of the ear and passed directly through the brain. It would have been competent to show by the expert what the immediate effect of these wounds would be, and allow the jury to determine from all of the evidence whether it was possible that, the murder being committed as the witness Eichtenkamp testified, the deceased could have fallen in the position in which she was found. It may be considered that the objection might have been sustained on account of the form of the question, still, the witness being allowed to answer, the remark of the court might be prejudicial to the defendant as tending to lessen the force of this evidence which under the circumstances in the case appears to have been quite important.

10. After the court, on its own motion, had instructed the jury in regard to the evidence of the previous good character of the defendant, the defendant requested the following instruction, which was not embraced in that given by the court: "You are instructed that the accused has called witnesses to prove his good character and that he is a peaceable and law-abiding citizen; the same is before you pertinent and proper. And the evidence that the prisoner possessed a good character for being a peaceable and law-abiding citizen may be relied on to raise a doubt of his guilt sufficient to acquit him, which, without such proof, would not have existed. And if, after you have carefully examined the evidence in this case, you shall be able to reconcile it with the innocence of the prisoner, it will be your duty to acquit him." It would have been improper for the court to tell the jury that evidence of good character "may be relied on to raise a doubt of his guilt sufficient to acquit him," and this instruction was properly refused. It is true that good character counts for much in a prosecution of this kind, and a defendant may often very safely rely upon his good character to obtain an acquittal, but whether it should be relied upon by the jury in a particular case

as sufficient to acquit him is wholly a question for the jury, and not for the court.

11. The defendant requested the following instruction: "You are instructed that the presumption of innocence continues with the accused until his guilt is established by the evidence beyond a reasonable doubt." It is usual to embrace the idea of this request in instructions as to the presumption of innocence, and it is ordinarily better to do so. The instruction as given by the court has been frequently given, and has not ordinarily been considered as of itself sufficient ground for reversal. It is not clear that the defendant was prejudiced in this case by the omission complained of.

12. Many rulings of the court in the admission and exclusion of evidence are complained of. The witness Eichtenkamp was cross-examined by different attorneys for the defendant, and much of the ground was gone over with more than once and many immaterial and unnecessary questions were asked the witness. This fact may have led to the exclusion of some of the evidence that ought to have been admitted.

The witness Eichtenkamp, as we have seen, testified at the coroner's inquest, and his evidence there was wholly inconsistent with his evidence given upon the trial. He attempted to explain this fact by stating that, when he testified at the inquest, he was actuated wholly by fear of the defendant. Upon his cross-examination he was asked: "You were around to parties and beer drinks with your friends yourself, and never told any of them, did you?" The question was objected to as improper cross-examination, and immaterial, and assuming a state of facts not in the evidence. The objection was sustained and the evidence excluded. The evidence seems to be material and proper in cross-examination, and ought not to have been excluded for the reason given in the objection. Other similar questions were also erroneously excluded. Also the witness was not allowed to answer whether he had during the intermission of

the court been talking with a detective who was interested in the prosecution, and whether the detective was not then talking to him in regard to the evidence in the case.

There was some evidence tending to show that, after the defendant left home on the afternoon of the murder, the deceased had been working in the garden, and had there been criminally assaulted by some person, and afterwards murdered, and that the deceased was accustomed to taking care of and working in the garden. The defendant produced a witness who testified that some hoeing had recently been done in the garden, and the defendant offered to prove that early the next morning the weeds and grass that had been hoed in the garden indicated that the work had been done during the afternoon previous. This evidence ought to have been received, but it was excluded by the court. The weather was warm and the sun was bright on the afternoon of the murder, and the evidence strongly indicates, if it does not show, that if this work was done during that afternoon it must have been done by the deceased, and that none of the work was done in the garden during the forenoon of that day.

The witness Eichtenkamp was asked if he was "pretty badly scared" by the defendant, and whether he could run faster than the defendant, and whether he could have run down to one of the neighbors and told them about the murder; whether he said anything about the murder until after he knew that he himself was suspected; whether he knew that he himself was suspected at the time he told the sheriff about it; how badly the gate between the hog lot and the yard where the deceased lay was broken; how long it would have taken him to repair the gate; whether he made certain statements at the preliminary examination as to the condition of the gate, and why he did not close it; whether, when the witness was with his family immediately after the murder, anything was said about the murder; whether

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he talked with his father about the case immediately after the murder; whether the defendant and the deceased "got along pretty well as brother and sister," and whether their relations were pleasant and agreeable so far as he knew, and other questions of like character; whether the deceased made outcries when she was assaulted by the defendant, and whether she knew that the witness was in the yard at the time or not. These questions were excluded upon objection of prosecution, and the witness was not allowed to answer. Possibly some of these questions had already been sufficiently answered, and the court excluded them for that reason. Some of them had not been answered by the witness. They were material and proper in cross-examination, and should have been allowed. The cross-examination at some points was too much restricted, and in some respects too much latitude was allowed.

Other matters are discussed in the briefs, but it is not thought that their discussion would be of assistance in another trial, and we do not consider it necessary to further extend this opinion, already, perhaps, too long.

For the reasons stated, the judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

BENJAMIN F. MOREHOUSE, APPELLEE AND CROSS-APPELLANT,
V. ELKHORN RIVER DRAINAGE DISTRICT, APPELLANT;
RUDOLPH B. SCHNEIDER ET AL., APPELLEES.

FILED NOVEMBER 28, 1911. No. 17,191.

DRAINS: ASSESSMENT: SALES: SCHOOL LANDS: RIGHTS OF STATE.

School lands that have been sold by the state under contract are properly included in a drainage district, and are assessable for benefit therein. If such lands are sold for such special assessments, section 223, ch. 77, art. I, Comp. St. 1911, applies, and only the interest of the original purchaser from the state or his

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assigns can be sold; the rights of the state in the land will not be affected by such sale.

APPEAL from the district court for Dodge county:
CONRAD HOLLENBECK, JUDGE. *Reversed.*

Courtright & Sidner, for appellant.

*Grant G. Martin, Attorney General, J. W. Graham,
F. Dolezal and Nye F. Morehouse, contra.*

SEDGWICK, J.

This plaintiff purchased from the state a tract of school land, and has made some improvements thereon. The land is now worth \$65 an acre, and the state has not been paid therefor in full. The payments hereafter to be made to the state amount to \$20 an acre. This land has been included in the defendant drainage district. The proper officers of the district made an apportionment of benefits against the land amounting to \$1,016.60. The plaintiff began this action to enjoin the defendant from proceeding further to make this apportionment a charge against the land. The state afterwards became a party, and joined with the plaintiff in contesting the right of the defendant to proceed further in the matter of the assessment. The district court held that the land was not assessable for benefits, and that the plaintiff had no such interest in the controversy as to enable him to maintain the action, and assessed costs against plaintiff. The plaintiff and the defendant drainage district have appealed.

1. It is contended that the school lands of the state are not assessable by drainage districts. By section 3, art. VIII of the constitution, "The proceeds of all lands that have been, or may hereafter be, granted to this state, where, by the terms and conditions of such grant, the same are not to be otherwise appropriated," are declared to be "perpetual funds for common school

purposes of which the annual interest or income only can be appropriated." Section 9 of the same article provides: "All funds belonging to the state for educational purposes, the interest and income whereof only are to be used, shall be deemed trust funds held by the state, and the state shall supply all losses thereof, that may in any manner accrue, so that the same shall remain forever inviolate and undiminished." It seems at least doubtful that the interest of the state in school lands can be divested for such purposes without the consent of the state, acting through its legislature, even if the state could so consent under the provision of the constitution. We do not think that this question is involved in this case. It was suggested in *Von Steen v. City of Beatrice*, 36 Neb. 421, that section 13 (Comp. St. 1891, ch. 77, art. I, sec. 2) of our revenue law (Comp. St. 1911, ch. 77, art. I, sec. 13), exempting the property of the state from taxation, might be intended to apply to and include assessments for public improvements. It is said that the authorities construing similar provisions are conflicting, and it was not found necessary to decide the point. There seems to be much more reason to so construe sections 34 and 223, ch. 77, art. I, Comp. St. 1911, which are as follows: Section 34: "School lands sold under the provisions of any law of this state, or such as have been heretofore sold, shall not be taxable until the right to a deed shall have become absolute, but the value of the interest of such purchaser shall be taxable, which interest shall be determined by the value of the land and improvements, less the amount due the state." Section 223: "Whenever any school or university land bought on credit is sold for taxes, the purchaser at such tax sale shall acquire only the interest of the original purchaser in such land, and no sale of such lands for taxes shall prejudice the rights of the state therein, or preclude the recovery of the purchase money or interest due thereon; and in all cases where the real estate is mortgaged or otherwise encumbered to the school or uni-

versity fund, the interest of the person who holds the fee shall alone be sold for taxes and in no case shall the lien or interest of the state be affected by any sale of such encumbered real estate made for taxes."

These sections are definite, and apparently justly dispose of this whole matter. The interest of this plaintiff in this land is \$45 an acre. It is a real estate interest under the contract which he holds with the state. *Mauzy v. Hinrichs*, 89 Neb. 280. His interest in the land has been benefited by this drainage in at least the amount apportioned to it. If this assessment is not paid, and the land is sold pursuant to the statute above quoted, the rights of the state will not be affected thereby. They will be amply protected. Section 34, ch. 74, laws 1883, provided that school lands that had been sold under the provisions of that act should not be taxable until the right to a deed had become absolute, "except for the value of the interest of such purchasers." In the act of 1899 (laws 1899) ch. 69, sec. 13, a proviso is added to this section, making such lands, when situated within any city or village and subdivided into lots, subject to special assessments, "except that a sale of such school lots to collect such assessment or assessments shall only pass the interest or title of the purchaser from the state." This section was afterwards amended, so as to apply also to saline lands. Comp. St. 1911, ch. 80, sec. 13. Section 35 of the revenue act (Comp. St. 1911, ch. 77, art. I) provides that improvements on leased public lands shall be assessed as personal property. Section 13, ch. 80, *supra*, declares that "the value of the interest of such purchaser shall be taxable." This is a part of the act relating to school lands and funds; it is not a provision for raising revenue, and there would seem to be no reason for restricting its application to taxation for general revenue, unless such construction is made necessary by the proviso. This proviso allows the sale of city or village lots, but such sale shall only pass the title of the purchaser from the state. None of the statutes above referred to is mentioned in this

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years after the death of the testator the county attorney of Saunders county, Nebraska, filed an application in the county court of said county for the appointment of appraisers to ascertain the value of said estate, so that the amount of the inheritance tax due thereon might be determined and collected. The county judge of Saunders county thereupon appointed appraisers, as provided by law, who qualified and made appraisements in the counties of Saunders, York, Butler, Lancaster, Seward, and Franklin, in which counties the real estate, which passed by the provisions of the will above mentioned, was situated. The value of said real estate was found to be \$182,320, while the personal property was appraised at the sum of \$40,657.85. On the request of the executors, the county court deducted the value of the personal property from the total value of said estate, and held that the same was not subject to an inheritance tax because its *situs* was in Cass county, Iowa, where the testator resided at the time of his death. There was also deducted from the value of the real estate the amount of \$20,000, being the sum of \$10,000 to each of the devisees under the will which was exempt from the levy of an inheritance tax under the laws of this state. After the above reductions were made there remained the sum of \$162,320, which was held by the county court to be subject to and liable for an inheritance tax under the provisions of sections 11201-11220, Ann. St. 1909, known as the "inheritance tax law," and the amount of such inheritance tax was fixed at the sum of \$1,623.20, upon which interest was charged from the date of the death of the testator, amounting to \$333.30. The executors were ordered to pay said sum to the county treasurers of the aforesaid counties in proportion to the appraisements made therein, and to file receipts for such payments. It appears that on or about the 17th day of January, 1908, the executors paid into court the sum of \$1,044.44, which they claimed was sufficient to discharge the inheritance tax for which the estate was liable, and appealed from the order of the

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county court. They thereafter filed their petition in the district court for Saunders county, setting forth the facts above stated, and assigned four distinct grounds therein for the reversal of the order of the county court.

It was first alleged that there is no valid law in the state of Nebraska requiring the payment of an inheritance tax. The second allegation was, in substance, that Hetta A. Sanford as the widow of the testator was entitled to dower in the lands devised by his will, and that her dower interest was not subject to the levy of an inheritance tax. It was further alleged that Charles W. Sanford, the son of the testator, had a claim against the estate of his father amounting to \$35,524.95 for services rendered as clerk during the last 11 years of his father's life, and that it had been agreed between the executors that the claim should be fully paid by transferring to said Charles W. Sanford from the said estate certain real estate situated within the state of Nebraska in excess of the amount of property which said Charles W. Sanford should have received under the provisions of his father's will, and that therefore that sum was not subject to the inheritance tax imposed by the county court, and that it should be deducted from the appraised value of said real estate situated in Nebraska. And, finally, it was alleged that the computation of interest from the date of the death of the testator was void, and was made without authority of law.

To this petition, and each of the four grounds mentioned therein, the county attorney of Saunders county demurred, for the reason that the petition failed to state facts sufficient to constitute a defense to the order of the county court finding the amount and directing the payment of the inheritance tax above mentioned. Upon a hearing in the district court, the demurrer was sustained and the order of the county court was affirmed, and from that judgment the devisees, who are the executors above mentioned, have brought the case to this court by appeal.

The contention that the law requiring the payment of

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an inheritance tax is void was settled by the decision in *State v. Vinsonhaler*, 74 Neb. 675, where the law was upheld; and as the appellants seem to have abandoned that assignment, it will receive no further consideration.

The first question to be determined by us is the claim that appellants should have been allowed to deduct from the gross value of the real estate situated within this state the amount of the widow's dower. On this question there seems to be some conflict in the authorities. The courts of New York and Pennsylvania, in construing the inheritance tax laws of those states, have held that the dower interest of the widow is not taxable. *In re Weiler's Estate*, 122 N. Y. Supp. 608; *Commonwealth's Appeal*, 34 Pa. St. 204. In *Estate of Kennedy*, 157 Cal. 517, 108 Pac. 280, the supreme court of California held that the homestead and statutory allowances pending the settlement of the estate of the deceased were exempt from the succession taxes.

The supreme court of Illinois, however, construing the provisions of its inheritance tax law, of which our own is almost a literal copy, held in *Billings v. People*, 189 Ill. 472, 59 L. R. A. 807, that dower was subject to the payment of the inheritance tax. That was a case where the widow renounced the provisions of the will of her deceased husband and took dower. On appeal to the supreme court of the United States the judgment of the state court was affirmed. *Billings v. Illinois*, 188 U. S. 97.

As we view the record, we are not required to determine that question, for it appears in the instant case that the widow did not renounce the will, but took her share of the real estate under and according to its provisions. By that course she brought herself squarely within section 11201, Ann. St. 1909, which reads, in part, as follows: "All property, real, personal and mixed, which shall pass by will or by the intestate laws of this state from any person who may die seized or possessed of the same while a resident of this state, or, if decedent was not a

resident of this state at the time of his death, which property or any part thereof shall be within this state, or any interest therein or income therefrom, which shall be transferred by deed, grant, sale or gift made in contemplation of the death of the grantor, or bargainor, or intended to take effect, in possession or enjoyment, after such death, to any person or persons or to any body politic or corporate in trust or otherwise, or by reason thereof any person or body corporate shall become beneficially entitled in possession or expectation to any property or income thereof, shall be and is subject to a tax, at the rate hereinafter specified, to be paid to the treasurer of the proper county for the use of the state, and all heirs, legatees and devisees, administrators, executors and trustees shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed." We are therefore of opinion that the widow, by taking under the will, instead of asserting her right to dower, is not in a position to claim the exemption for which she now contends.

Appellants also strenuously insist that they should have been allowed to deduct the claim of Charles W. Sanford for \$35,524.95 against his father's estate from the gross value of the real estate as returned by the appraisers before estimating the amount of the inheritance tax. There seems to be two good and sufficient reasons for denying this relief. It appears that at the time of his death the testator was the owner of more than \$40,000 worth of personal property in this state, which, under the provisions of chapter 13, Ann. St. 1909, was primarily liable for the payment of this claim. The district court held that appellants were entitled to withdraw this property from taxation because of their claim that its *situs* was in the state of Iowa where the testator resided at the time of his death; but by so doing, they will not be permitted to make their claim payable out of the real estate, and thus, to that extent, escape the payment of the inheritance tax. The other reason for a denial of

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this claim is that at the time of the death of the testator the real estate situated in this state, the value of which is now sought to be taxed, passed by the terms of the will to the appellants. Its status, so far as the inheritance tax law was concerned, was at that time fixed and determined, and no agreement which the devisees, as executors, should thereafter make between themselves in regard to the satisfaction of this claim could in any way affect the right of the state to ascertain and collect its inheritance tax. The district court was therefore right in its determination of this question.

Finally, it is contended that the taxing authorities were not entitled to interest on the amount of the inheritance tax from and after the death of the testator, and before such amount was ascertained. It is urged as a reason for this contention that it was not possible at that time to ascertain the value of the estate, and that interest should only be computed after such value was in fact ascertained. This contention is in direct conflict with section 11203, Ann. St. 1911, which provides: "All taxes imposed by this act, unless otherwise herein provided for, shall be due and payable at the death of the decedent, and interest at the rate of seven per cent. per annum shall be charged and collected therefrom for such time as such taxes are not paid; provided, that if said tax is paid within six months from the accruing thereof, interest shall not be charged or collected thereon, and in all cases where the executors and administrators or trustees do not pay such tax within one year from the death of the decedent they shall be required to give a bond, in the form and to the effect prescribed in section two of this act, for the payment of said tax together with interest." It cannot be successfully contended that the appellants could not have ascertained the value of the taxable estate within six months after the testator's death. By so doing, and by the payment of the tax within that time, they could have avoided the payment of any interest whatsoever. It appears from their peti-

tion that they took no steps to that end, and that by their delay they compelled the county attorney of Saunders county to institute proceedings, as late as two years after the death of the testator, to ascertain and collect the amount of the inheritance tax. Therefore, they are in no position to claim exemption from the payment of interest, as provided by the section of the statute above quoted.

A careful examination of the record satisfies us that the judgment of the district court was right, and it is therefore

AFFIRMED.

REESE, C. J., being disqualified, took no part in the decision.

FAWCETT, J., dissenting.

This case was heard in the court below upon a general demurrer to a pleading filed by the executors, which has been designated by both parties and by the trial court as a "petition." As they have seen fit to so designate it, I will do likewise.

The petition alleges: That Whitfield Sanford, at the time of his death, was a resident of Cass county, Iowa; that he died August 4, 1905, testate; that the district court for Cass county, Iowa, took jurisdiction to administer said estate; that the administration thereof is still pending and said court still retains full and exclusive jurisdiction of all matters connected with the settlement of the estate.

That the deceased kept the control and management of his business; that all of his personal property was held in said Cass county; that he had no agent in Nebraska with authority to control or reinvest money; that the will left the bulk of his estate to the appellants, his wife and son.

That the county court of Saunders county without authority, upon suggestion of the county attorney, ap-

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pointed appraisers for the purpose of levying the inheritance tax; that the appraisers duly filed their report, from which appellants appealed, first, to the county court, and then to the district court.

That the estate is not liable, for the reason that no valid law gives authority or jurisdiction to the county court of Saunders county, or to any court in Nebraska, to levy an inheritance tax.

That, in ascertaining the value of the real estate in Nebraska, the appraisers and the courts below refused to deduct from such appraisal the dower interest of the appellant widow; that to the extent of her dower, under the law in existence at the time of the death of Mr. Sanford, the estate was not subject to tax.

That at the time of Mr. Sanford's decease, and for eleven years prior thereto, the appellant Charles W. Sanford, one of the executors of said will, and a legatee thereunder, was in the employ of deceased as his clerk, under an agreement that Charles should be compensated therefor by the deceased; that it was agreed between Charles and the deceased, during the life of the latter, that, in case Charles should not demand or withdraw from the business of the deceased money due him for such services, the amounts due him were to be allowed to draw interest until the final settlement should be made; that after the death of Mr. Sanford the widow, who was one of the executors, and Charles had a settlement and adjustment of the claim of Charles against deceased, with the result that it was ascertained and agreed that the estate was indebted to Charles, a resident of Nebraska, in the sum of \$35,524.95, which amount it was agreed Charles should receive from said estate; that by the said agreement it was stipulated and agreed that the claim of Charles should be paid by transferring to him from the estate of deceased real estate in Nebraska in excess of the property that Charles should receive from the estate as one of the beneficiaries of the will; that, in determining what portion of the real estate in Nebraska

Charles should receive, there was set over to him certain real estate of the value of the agreed claim in excess of the amount of property Charles would have been entitled to receive under the law; "this being in full settlement and satisfaction of said claim of Charles W. Sanford, and so accepted by him."

That the county court wrongfully included in the valuation the said sum of \$35,524.95, and levied a tax thereon and included it in the amount found due from the estate.

That the agreement and settlement of the claim of Charles against the estate were made and entered into with the full consent and understanding of the executors of the estate, and were made for the benefit of the estate; that the county court had no authority or jurisdiction to include said amount in ascertaining the amount of inheritance tax to be paid, for the reason that the claim was a just and proper claim against said estate, and was properly paid, settled and satisfied, and the amount thereof should have been deducted from the value of the real estate in Nebraska; said real estate not having been received by Charles "by virtue or reason of any inheritance or bequest or under the intestate laws of the State of Nebraska."

That at the time of the death of Mr. Sanford, and at all times thereafter until the appraisement of the real estate, the amount of inheritance tax due from the estate was unknown and unascertainable; that the only method or manner of ascertaining the value of the real estate in Nebraska was through the appraisement so made as ordered by the county court; that appellants had no knowledge of and no way of ascertaining the amount which could be claimed due as an inheritance tax until such appraisement had been filed; that, in determining the amount to be paid, the county court wrongfully and without authority of law ordered payment of interest from August 4, 1905, until the same should be paid; that said computation of interest was wrongful, without

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authority of law, and that the estate should not be subject to the payment of any interest prior to the time of finally ascertaining and determining the amount or value of the taxable estate in Nebraska.

The prayer of the petition is: (1) That the dower interest of the widow be deducted from the total value of the estate. (2) That the amount of the claim of Charles be deducted. (3) That the amount of the tax due from the estate should not draw interest until the final determination thereof. (4) That the assessment of an inheritance tax against the estate may be decreed as without authority of law, and as null and void, and of no force; and for general relief.

The record before us contains nothing more than the petition above set out, the general demurrer of defendant, and the journal entry of the judgment below. At first blush it might seem that the judgment would have to be affirmed for want of a sufficient transcript; but on more careful consideration it is apparent that both sides thought that the petition presented everything necessary to settle the questions of law involved, and thereby determine the rights of the parties. With that purpose in view, it evidently was not thought necessary to encumber the record with the transcript of the proceedings in the county court. In this I think counsel were right. Very few of the important facts and figures referred to in the majority opinion appear in the record, as will be observed by the most casual reading of the petition. They were, in my judgment, improperly gleaned from the brief of counsel for appellee. As he has seen fit to rest upon his demurrer to the petition, he should be held to the admitted facts averred in the latter. Upon the face of the record, therefore, the judgment should be reversed. Passing that, it will be seen that three important questions are presented. They will be considered in the order in which they appear in the petition.

1. Should the value of the widow's dower have been

deducted? I think it should. Our inheritance tax law (laws 1901, ch. 54) was first adopted in 1901. It was approved April 1, in that year. The title of the act is, "An Act to tax gifts, legacies and inheritances in certain cases and to provide for the collection of the same." The right of dower cannot by any reasonable process of construction be held to be a gift, a legacy or an inheritance. *Billings v. People*, 189 Ill. 472, under an act from which it is asserted ours was copied, holds that dower is subject to the inheritance tax, and it is insisted that, inasmuch as *Billings v. People* was decided before our act was adopted, we are bound by the holding in that case.

Counsel for the appellee places great stress in his brief upon an assertion that *Billings v. People* was appealed to the United States supreme court (*Billings v. Illinois*, 188 U. S. 97) and affirmed in that court. The majority opinion makes the same statement. In justice to the fairness of counsel, I conclude that he has not read that case as it is reported in the United States supreme court reports. I have before me the lawyer's edition, 47 L. ed. 400. The syllabus (entire) reads: "The equal protection of the laws is not denied by the Illinois inheritance tax law because, under that statute as interpreted and enforced by the state courts, certain life estates may be taxed when the remainder is to lineal descendants of the decedent, but not when the remainder is to collateral heirs or strangers in blood." In the opinion it is stated: "The widow was an appellant in the supreme court of the state, but she is not a party here." That case was taken to the supreme court of the United States by devisees other than the widow, so that the holding of the supreme court of Illinois upon the question of dower was not presented to, or in any manner considered by, the supreme court of the United States. I regret that it was not, as I feel very confident that that eminent court would have declined to follow the reasoning and holding of the Illinois court. I might say here that,

whether our act was copied from the Illinois act or not, that act, as stated by the supreme court of that state in *People v. Griffith*, 245 Ill. 532, 539, was taken from the statute of New York, of 1887. Would it be unreasonable to say, in the absence of *proof* as to which statute was followed, that our legislature followed the older statute, which had been in force for 14 years, and many of its provisions construed by the courts of that state? To my mind the rule that, where one state adopts a statute of another state which has received judicial construction, it is presumed that the legislature intended the statute should receive the same construction by the courts of the state adopting the statute, like all other general rules, has its exceptions. That the case at bar should be held an exception to the rule stated is made clear by the fact that *Billings v. People* made its first appearance in print in 59 N. E. 798, March 29, 1901, and our act under consideration here was approved three days later. The thought that any member of our legislature knew of that decision when the act was passed, or that the governor had ever heard of it when he signed the same, cannot be seriously considered. But, be that as it may, this court has stated how far it will consent to be bound by the construction of a statute of another state which has been adopted in this state. In *Morgan v. State*, 51 Neb. 672, 693, in an opinion by Post, C. J., we said that the decision in such a case must "be regarded as a construction of the statute, to be ignored or rejected only for reasons which would require the overruling thereof had the decision been pronounced by this court, and in that light it will now be examined." I think that is the very extent of the limit to which we should go in holding that we are bound in such a case. In accordance with the rule announced by Post, C. J., I am considering *Billings v. People* as if that decision had been pronounced by this court, and, so considering it, I unhesitatingly assert that the decision is not sound and should not be followed. If we follow *Billings v. People*,

we must not only read into the act that which it does not contain, but we must enlarge the title to the act itself. If Mrs. Sanford had declined to take under the will and had elected to take under the statute, so far as the value of her dower is concerned, there is no theory upon which, under our act, the value of that dower could have been taxed. It really needs no citation of authorities to support the statement that a tax of this character cannot be aided by construction.

"(6) The meaning of section 1 of the inheritance tax law as to what property of nonresident decedents shall be subject to the tax is not entirely clear, and the language thereof should not be extended beyond the clear import of the words used, in order to bring property within the provisions of the act and subject it to the tax." *People v. Griffith*, 245 Ill. 532. It seems to me that if the Illinois court had had that very correct rule in mind at the time it decided *Billings v. People*, *supra*, the decision in that case would have been the very opposite of what it was.

In *People v. Griffith*, it is further said: "(8) where one state adopts a statute of another state which has received judicial construction, it is presumed that the legislature intended the statute should receive the same construction by the courts of the state adopting the statute, *unless such construction is in conflict with the spirit and policy of its laws*." (Italics are mine.) Under the rule thus stated, we are not bound by the holding in *Billings v. People*, as in my judgment that case is squarely in conflict with the spirit and policy of the laws of this state, which are that statutes levying taxes of any kind, which are special in their nature, will be strictly construed, and will never be aided by construction so as to extend them beyond the clear import of their terms. While I freely concede that the legislature has the power to pass an act imposing a tax of this character upon a widow's dower, I assert that it has not done so; and, until the legislature has expressly

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made dower subject to such a tax, the courts are powerless to do so. In such a case, where the legislature stops the court should stop. A woman does not obtain a dower interest in property by the grace of, or as a gratuity from, her husband. It is hers, absolutely, beyond his control. It is an interest which he cannot alienate, which he cannot encumber, which his creditors cannot reach, which she alone, by deed, can alienate. As said by this court in *Butler v. Fitzgerald*, 43 Neb. 192: "When lawful marriage of a man and woman and the ownership of real estate by the former concur, an inchoate dower right attaches in the nature of a charge or incumbrance upon the real estate of the husband; and when such right has once attached, it remains and continues a charge or encumbrance upon the real estate, unless released by the voluntary act of the wife or be extinguished by operation of law, and is consummate upon the death of the husband."

In *Motley v. Motley*, 53 Neb. 375, we held: "The statutes of the state expressly provide how a widow may be lawfully barred of dower in the lands of which her husband died seized, and this bar is made to depend upon her voluntary act."

In *In re Weiler's Estate*, 122 N. Y. Supp. 608 (March, 1910), the syllabus states: "A widow's dower estate in lands of her deceased husband, which became vested on her marriage and consummate on the death of her husband, independent of the husband's will, and not by virtue thereof, was not subject to transfer tax." In the opinion it is stated: "The widow's estate of dower in the lands of the decedent was property, which became vested as an inchoate estate upon her marriage and consummate upon the death of her husband, independent of the will, and not by virtue thereof. (Citing numerous cases.) It was, therefore, not subject to transfer tax, and in assuming it to be so both parties were in error when the order fixing tax was made." In *In re Green's Estate*, 124 N. Y. Supp. 863 (May, 1910), the syllabus

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states: "Where a wife, a resident of the state, dies without a will, leaving a husband and no descendants, the husband does not take her property under the intestate laws of the state, and there is no taxable transfer thereof under tax law." The two cases last above cited were decided in surrogate's court in New York county and Kings county, respectively. Neither case, so far as I have been able to find, reached the court of appeals. While they are not decisions of the court of last resort, they are decisions of two surrogate's courts, the judges of which in late years have always been lawyers of high standing.

In *Commonwealth's Appeal*, 34 Pa. St. 204, it is held: "A testator devised his whole estate to his executors, in trust for legatees and devisees; the widow refused to take under the will, but subsequently, by an arrangement with the executors, approved by the orphans' court, accepted the sum of \$80,000, which was less than her share of the estate, and relinquished her claim to the residue. *Held*, That she took this sum under her paramount title as widow, and not as a payment out of the fund bequeathed to the executors in trust; and that it was not, therefore, subject to the collateral inheritance tax."

In *Estate of Kennedy*, 157 Cal. 517, it is stated in the syllabus: "A homestead right, or a right to have a homestead, is not a right which vests under the law of succession. It is a right bestowed by the beneficence of the law of this state for the benefit of the family. Setting apart a probate homestead is a part of the proceeding in the probate court, as much so as the family allowance." There are other matters passed upon in this case. The case is an interesting one, and shows clearly how that court would hold upon the question of the right to tax dower.

I therefore proceed with the further consideration of this point upon the assumption that, upon the death of Mr. Sanford, the dower interest, which Mrs. Sanford had

theretofore held and owned subject to be defeated only by her own deed or the predecease of her husband, became consummate. It then ceased to be an inchoate right, and, *eo instanti*, became a vested interest in all of the lands in Nebraska of which Mr. Sanford died seized; and to the extent of that vested interest she was entitled to a share of his lands without payment of any inheritance tax. If she saw fit to avail herself of an option given her, in the will of her deceased husband or under the statutes, to either take *that* interest in the land or *another and different* interest, and that other and different interest exceeded in value her vested interest *which she was exchanging therefor*, she could only be properly charged with the excess value. To my mind it is precisely the same as if she took by statute, as her dower, a certain specific tract, say section one, and the provision in the will was that she might take, in lieu thereof, sections two and three; in such a case she would be entitled to deduct from the value of sections two and three, which she was to receive under that provision, the value of section one, which she was giving up.

In *Isehart v. Brown*, 1 Edw. Ch. (N. Y.) *411, it is held: "A bequest in lieu of dower, and the acceptance of the same, amounts to a matter of contract and purchase; and the wife is to be paid the bequest in preference to other legacies and without abatement. But the debts are to be paid first." In the opinion (p. *413) the vice chancellor says: "It is the price put by the testator himself upon that right, and which she is at liberty to accept. Her relinquishment of dower forms a valuable consideration for the testamentary gifts. In this point of view, she becomes a purchaser of the property left to her by the will. So, on the other hand, the husband offers a price for his wife's legal right of dower which he proposes to extinguish; and, if she agrees to the terms, she relinquishes it and is entitled to the price. It is, therefore, a matter of convention or contract between them; and what she thus becomes entitled to

receive is not by way of bounty, like other general bequests, but as purchase money for what she relinquishes, and which, consequently, must be paid in preference to other legacies; they being merely voluntary."

In *Blatchford v. Newberry*, 99 Ill. 11, the sixth paragraph of the syllabus holds: "A provision by will in lieu of dower is, in fact and in legal effect, a mere offer by the testator to purchase out the dower interest for the benefit of his estate." That part of the opinion upon which the above syllabus is predicated will be found on pages 55 to 62 inclusive. There are numerous other cases to the same effect as those last above cited, one (which I have misplaced and will not take the trouble to try to find again) from the supreme court of the United States. To my mind these cases clearly show that, to the extent of the value of her dower interest, Mrs. Sanford took nothing by way of "gift, legacy or inheritance" from her husband, and that, if she saw fit to exchange her vested interest of that value for another interest which was tendered her in lieu thereof, it was simply an exchange of one interest for another, and she was entitled to have the value of that which she was giving deducted from that which she was to receive.

2. Should the property conveyed to Charles in satisfaction of his claim have been deducted? The district court held that it should not. In this I think the court erred.

In the light of the view that I take of this branch of the case, the authorities cited on page 17 of brief of appellee are unimportant. The question as to whether or not the rules of law in reference to taxation of *property* are applicable is not involved; nor is the question of the possibility of double taxation; nor is it material for the consideration of this point whether the act of our legislature under consideration constitutes a tax upon property or upon the right of succession. The only question involved by the admitted allegations of this

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petition are: Can the amount of a claim of a citizen of this state for services rendered a nonresident in his lifetime, and which, after the death of such nonresident debtor, is ascertained, adjusted and paid by the executors of his will, be taxed as a gift, legacy or inheritance? I say, *No*.

The petition alleges and the demurrer admits the following facts: That the decedent left no personal property in this state, but that all of such property was owned and held by him and taxed in Cass county, Iowa; that Charles W. Sanford was in the employ of the decedent for eleven years prior to his death, under an agreement that he should be paid for his services, and that, in case he should not demand or withdraw from the business of the deceased the amounts due him for such services, such amounts were to draw interest until a final settlement or adjustment should be made; that, after the death of the testator, the widow of the deceased, who was one of the executors, and Charles had a settlement and adjustment of the claim for such services, and that as a result of such settlement and adjustment it was "ascertained and agreed" that the estate was indebted to Charles in the sum of \$35,524.95. which amount it was agreed Charles should receive in real estate situated in Nebraska; and that, under such agreement, a sufficient amount of real estate in Nebraska was set over to Charles in full settlement and satisfaction of his claim, and was so accepted by him.

From the above admitted facts I conclude that the law which requires that the personal estate of a decedent be first exhausted before recourse is had to the real estate does not apply. A citizen of this state who has a claim against a nonresident, or against a nonresident estate, is not required to go to the domicile of such nonresident or nonresident estate and litigate his claim in the courts of that jurisdiction, when there is property, either real or personal, situated in this state. It is possible that, if there had been personal property of

the decedent in this state, Charles would have been obliged to first exhaust that personal property before he could proceed against the real estate, but, where there was no personal property in this state, he could proceed at once against the real estate. It perhaps would have been better practice for him to have made application to the county court of some county in this state, in which real estate of the decedent was situated, for the appointment of an administrator with the will annexed, and have filed his claim with, and had it allowed by, that court; but I do not think he was required to do that when the executors of a solvent estate, who were also the sole beneficiaries under the will of decedent, came into this state and, for the purpose of saving expenses of administration here, took the matter up with him, "ascertained" the amount justly due him, and set over to him a sufficient amount of the estate situated in this state to satisfy such claim. In Schouler, Executors, (3d ed.) sec. 176, it is said: "But may not the title and authority of a foreign domiciliary representative be voluntarily recognized and debts paid him, or other assets voluntarily surrendered to him there? The doctrine of the English courts is that such payment or surrender affords no protection against the claim of a local administrator. A preference for the English doctrine seems to be expressed in Justice Story's treatise, though he had judicially affirmed the contrary in a circuit decision. The supreme court of the United States, however, has maintained the validity of such payments or delivery of the assets, as between different states, so as to discharge the local debtor or possessor; and the general current of American authority supports this doctrine; there being, it is assumed, when such payment or delivery was made, no local administration." Where there is no local administration, as in the case at bar, I see no reason why the converse of the above proposition should not be given the same legal sanction. If I, having in my hands assets belonging to a nonresi-

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dent at the time of his decease, can voluntarily deliver up those assets to a domiciliary executor, and thereby be absolved from all liability for such assets, why should not the same domiciliary executor be authorized to save his estate costs and expenses by recognizing a claim held against his estate by a nonresident creditor, when said claim is known and admitted to be correct, and satisfy the claim by turning over to such creditor a sufficient amount of property situated in the state where such creditor resides? If he does so, who shall pass upon the question of his authority to make such settlement, or upon the question as to whether or not such settlement was beneficial to the estate? I answer: The court from which such executor's appointment emanated. I do not think that a court of this state can, in any kind of an action where the above facts are alleged and admitted to be true, go behind such settlement, adjustment and satisfaction of such claim.

It is suggested by one of my associates that the act of the executors in allowing this claim was without authority and void. The only theory upon which we could say that is that the district court for Cass county was without power to authorize the executors to make such a settlement; for, if it had such power, then it must be presumed that the executors had first obtained such authority. But, conceding that the Iowa court did not have power to grant such authority, the fact still remains that, under the admitted allegations in the petition, appellee has not been prejudiced by the act of the executors. I think it will not be questioned by any of my associates that, after the death of Mr. Sanford, Charles might have applied for and obtained ancillary administration in this state, and secured the appointment of an administrator with the will annexed, and could have filed his claim and had it allowed; and, there being no personal property in this state, could have obtained leave to sell the real estate to pay the claim. If that course had been pursued and evidence introduced

upon the hearing of the claim establishing the facts admitted in this case to be true, the county court would have had no alternative but to allow the claim precisely as it was "ascertained" and adjusted by the executors in this case; and, upon allowing that claim, the county court would have been compelled to deduct the amount thereof from the value of the real estate situated in this state, and the residue only would have been liable for an inheritance tax.

In *In re Estate of Stone*, 109 N. W. 455 (132 Ia. 136), the third paragraph of the syllabus states: "A contract between the beneficiaries in a will, including a collateral legatee, renouncing the provisions of the will and providing for a division of the property, was valid and enforceable, though its effect was to deprive the state of a collateral inheritance tax otherwise assessable on the legacy to the collateral legatee." The reasoning in that case, applied to the case at bar, renders the fact that appellee, as a result of the adjustment of the claim of Charles by the beneficiaries under the will, may be deprived of an inheritance tax upon the amount of that adjustment immaterial.

3. Should the amount of whatever tax is found due draw interest from the date of the death of a testator, or from the date of the final determination of the amount of such tax?

At the oral argument I was inclined to the latter view; but on careful examination of the question I have reached a different conclusion. The reasoning of Steele, J., in *People v. Rice*, 40 Colo. 508, 91 Pac. 33, covers every phase of the question, and I am inclined to agree with the learned judge that "these are matters which should have appealed to the legislature; but the legislature, having before them the laws of other states containing more liberal provisions with respect to such matters, did not make provisions for a rebate of interest under such conditions, and this department, therefore, cannot grant relief."

The fourth point, that the inheritance tax law is null and void, is without merit.

SEDGWICK, J.

I concur in the view that lands taken by the widow under the will in lieu of dower are not subject to inheritance tax, except as to the excess in value of such lands over the value of the dower interest; and also in the suggestion that the majority opinion recites matters not contained in the pleading demurred to, nor anywhere in the record.

FIRST NATIONAL BANK OF TRENTON, APPELLANT, v. LINK
L. BURNEY ET AL., APPELLEES.

FILED DECEMBER 14, 1911. No. 16,569.

Evidence: NOTES: PAROL EVIDENCE. A promissory note or other contract in writing, in the absence of fraud or mistake, cannot be varied, qualified or contradicted by evidence of a prior or contemporaneous agreement resting in parol.

APPEAL from the district court for Hitchcock county:
ROBERT C. ORR, JUDGE. *Reversed.*

Perry, Lambe & Butler, H. W. Powell and F. M. Flansburg, for appellant.

C. W. Shurtleff, A. A. McCoy and W. S. Morlan, contra.

BARNES, J.

Action on a promissory note set forth in the plaintiff's amended petition, as follows: "Trenton, Nebraska, Aug. 6, 1908. No. 6,248. Demand after date, for value received, we jointly and severally promise to pay First Nat'l. Bank, Trenton, Neb., or order, twenty-one hundred forty-six and 80-100 dollars, \$2,146.80 at the First

First Nat. Bank v. Burney.

National Bank, Trenton, Nebraska, with interest at 10 per cent. per annum from maturity until paid. The makers and indorsers severally waive presentment for payment, protest, notice of protest and nonpayment, and consent that the time of payment may be extended from time to time without notice, and each hereby pledges his or her separate estate. (Signed) L. L. Burney, W. S. Britton." On the back of the note was the following: "Paid Dec. 1, 1908, \$932.08."

The defendants answered separately, each admitting the execution of the note, and set up affirmative matter as a defense, in substance as follows: That at and prior to the date of the note in suit the defendant Burney was indebted to the plaintiff bank in the sum of about \$1,000, which indebtedness was secured by chattel mortgages on horses, cattle and hogs owned and in possession of the defendant Burney, who was at that time engaged in the business of buying and selling stock; that a short time before the date of the execution of the note Burney went to the First National Bank and informed the officers that, owing to the dry weather, scarcity of feed, and low prices of live stock in that vicinity, he thought he ought to ship the stuff he then had; that he would like to ship to Clarinda, Iowa, where he believed he would find a good market; that at that time the defendant Burney did not have sufficient live stock on hand to make a two car shipment. The parties then figured the sum of money necessary to purchase the balance of a two car shipment, which, together with the amounts then owing by Burney to the bank, aggregated the sum of \$2,146.80. After the note was drawn up and signed, the bank released the chattel mortgages on Burney's live stock, delivered up his old notes, and Burney then used the balance of the money represented by the note to pay for stock he had bought and not paid for, and to purchase enough additional stock to make up a two car shipment.

It was further alleged in the answer of the defendant Britton that there was a parol understanding that the

defendant Burney was to turn over to the plaintiff bank the proceeds of the sale of stock shipped to Clarinda, Iowa, and execute a new note for any balance due on the note in suit with chattel mortgage security, and that all liability upon the note in suit as to the defendant Britton was to then expire. It was also stated in Britton's answer that it was orally agreed between the plaintiff and this defendant and the said Link L. Burney, in order that the said Link L. Burney might secure cattle, horses and hogs sufficient to complete the making of two car loads, the plaintiff should furnish to the said Link L. Burney the sum of \$—, and said last mentioned sum should be used by said Link L. Burney in purchasing cattle, horses and hogs, which should be put with the live stock he then had on hand, so that the same would make two car-loads, and said two car-loads should be shipped to Clarinda, Iowa, and there sold, and the money realized in the sale of the same should be applied to the indebtedness of the said Link L. Burney to the plaintiff; that defendant Britton signed said note merely to guarantee that the defendant Burney would account for and return to the plaintiff bank the proceeds of the Clarinda sale; and that, if the money realized therefrom should be paid by the said Link L. Burney to the plaintiff, Britton's liability on said note should be at an end. It also appears from the answer that the alleged verbal understanding was had prior to the execution of the note. The answer then states that relying upon the honesty of the said Link L. Burney as well as the plaintiff, and the representations and promises hereinbefore set forth, and for no other or different consideration, the defendant Britton signed said note; that the plaintiff, disregarding the agreement with this answering defendant, allowed the defendant Link L. Burney to speculate and squander a large portion of the proceeds of said sale.

The foregoing states the substance of the defense interposed by the defendant Britton. Upon the trial in

the district court for Hitchcock county the plaintiff had a verdict and judgment against the defendant Burney, but the verdict and judgment was against the plaintiff and in favor of the defendant Britton. The plaintiff has appealed.

One of the principal assignments of error upon which the plaintiff relies for a reversal of the judgment as to the defendant Britton is that the trial court, over the objections of the plaintiff, allowed the defendants to introduce evidence tending to show the parol agreement set forth in Britton's answer. The ground of the objection was that the terms of the written instrument itself could not be contradicted or varied by parol evidence. A like question was before this court in *State Bank of Ceresco v. Belk*, 56 Neb. 710. In that case the defendant by his answer admitted the execution of the note sued on, and pleaded as a defense a parol agreement that, prior to the date of the note, one Thomas Stretch had executed a note of a like amount to the plaintiff, with the defendant as surety; that, when the note became due, the defendant refused to sign a renewal thereof, and that it was agreed by and between the defendant and the plaintiff that the defendant should execute the note sued on and deliver it to the plaintiff, who was to hold it until he should secure other securities upon the note of the said Stretch, and then the note in suit should be returned to the defendant, and he should not be held liable thereon. It was further alleged, in substance, that thereafter the plaintiff did secure other sureties upon said new note of said Stretch, being the note referred to in the note sued on, and surrendered the original note and took and accepted the new note of said Stretch, with said sureties, by reason whereof and by reason of said agreement it became the duty of the plaintiff to return the note sued on to the defendant, and the defendant was relieved of liability thereon, and the same was fully paid, discharged and satisfied. On the trial in the district court Belk was permitted to

introduce evidence which sustained the averments of his answer, and the question presented by the record was the correctness of the ruling of the court in admitting that testimony. In consideration of the rule previously announced in *Hamilton v. Thrall*, 7 Neb. 210, *Van Etten v. Howell*, 40 Neb. 850, *Waddle v. Owen*, 43 Neb. 489, *Western Mfg. Co. v. Rogers*, 54 Neb. 456, and *Sylvester v. Carpenter Paper Co.*, 55 Neb. 621, it was held that, in the absence of fraud, mistake or an ambiguity in the writing, the contract constituted the best and only competent evidence, and the judgment of the district court was reversed. The rule there announced has since been adhered to in *Faulkner v. Gilbert*, 61 Neb. 602; *Garneau v. Cohn*, 61 Neb. 500; *Harnett v. Holdrege*, 73 Neb. 570; *Vradenburg v. Johnson*, 3 Neb. (Unof.) 326; *Mallory v. Estate of Fitzgerald*, 69 Neb. 312; *Aultman, Miller & Co. v. Hawk*, 4 Neb. (Unof.) 582. We are of opinion that the case at bar is within the rule announced in the cases above cited.

Counsel for the defendants have directed our attention to *Gifford v. Fox*, 2 Neb. (Unof.) 30, also the same case reported in *Fox v. Gifford*, 5 Neb. (Unof.) 502, and *Davis v. Sterns*, 85 Neb. 121. In those cases it was held that, as between the original parties to a promissory note, parol evidence could be received to show the consideration therefor. We think this has always been the rule, and it in no way conflicts with the principle announced in the cases which support this opinion. The other cases referred to by the defendants appear to have been sufficiently distinguished in *State Bank of Ceresco v. Belk*, *supra*.

Finally, to maintain certainty, we deem it proper for us to adhere to the long-established and well-settled rule relating to commercial paper, and we are of opinion that the district court erred in receiving the evidence complained of. Having reached this conclusion, the other assignments of error will not be considered.

For the foregoing reason, the judgment of the district

court is reversed and the cause is remanded for further proceedings.

REVERSED.

MERIBA ESSEX, APPELLEE, V. SOL A. KSENSKY ET AL.,
APPELLANTS.

FILED DECEMBER 14, 1911. No. 16,763.

1. **Depositions, Objections to.** An objection to a deposition, on the ground of a defect in the certificate of the officer before whom it was taken, cannot be considered unless made in writing, and filed before the commencement of the trial. *Yearsley v. Blake*, 85 Neb. 736.
2. **Intoxicating Liquors: ACTION: DAMAGES: REVIEW.** A judgment for damages will not be set aside on the grounds that it is not supported by the evidence and is excessive, if there is competent evidence in the record which supports it, unless a reviewing court can say that it is clearly wrong.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Affirmed.*

E. C. Strode, D. C. Burnett and M. V. Beghtol, for appellants.

George W. Berge, contra.

BARNES, J.

Action by a married woman against a licensed saloon-keeper and his bondsman to recover damages alleged to have been sustained by her and her minor children from the effects of intoxicating liquors sold to her husband. On the trial in the district court for Lancaster county, the plaintiff had a verdict for \$3,000, which the trial court, in ruling on a motion for a new trial, reduced to \$2,000 by requiring a remittitur. Judgment was rendered for that sum, and the defendants have appealed.

The appellants base their demand for a reversal of

the judgment upon two grounds, which will be disposed of in the order in which they were presented.

1. It is contended that the court erred in permitting the plaintiff to read the deposition of one William E. Mohan in evidence over their objections. The record discloses that the deposition was taken under a stipulation entered into for that purpose between the parties; that it was taken as agreed upon, and was returned to and filed by the clerk of the district court as prescribed by law. The deposition appears to be regular in all respects, excepting only the certificate of the officer before whom it was taken, which reads as follows: "Subscribed and sworn to before me this 9th day of November, 1909. Louis J. Conway, Notary Public."

It should be further noted that no seal was attached to the jurat. The deposition was received and filed by the clerk of the district court on the 13th day of November, 1909, and the trial commenced on the 8th day of December, following. No motion was made to suppress the deposition, and no objections or exceptions to it in writing were ever filed, as required by section 389 of the code, which reads as follows: "Exceptions to depositions shall be in writing, specifying the grounds of objection, and filed with the papers in the cause." Section 390 of the code further provides: "No exceptions other than for incompetency or irrelevancy shall be regarded, unless made and filed before the commencement of the trial."

It appears that, when the plaintiff offered to read the deposition, the defendants interposed an oral objection as follows: "We object to the offer at this time, for the reason there is no proper or sufficient foundation laid, not properly certified, and for the reason that it is immaterial at this stage of the case." The plaintiff read the stipulation under which the deposition was taken, and the court overruled the objection. It is strenuously contended that this was reversible error. The argument in support of this assignment proceeds on the theory that

the deposition was incompetent, although it appears from the record that incompetency was not one of the grounds of the objection. We are of opinion that this contention cannot be upheld.

In *Yearsley v. Blake*, 85 Neb. 736, it was held that "An exception to a deposition, on the ground of a defect in the notice, cannot be considered unless made in writing, and filed before the commencement of the trial." In the opinion in that case it was said: "As to the point that the notice to take depositions was not properly served, this need not be considered, because the alleged defect was known before the trial, but no exceptions were made before its commencement, as required by sections 389 and 390 of the code." The defect in regard to the certificate of the officer in this case was known to the defendants, and the right to object at the proper time and in the proper manner was not exercised. We think the rule in the foregoing case applies to and is decisive of the question at bar, and the court did not err in overruling the objection to the deposition made for the first time upon the trial of the cause.

2. Finally, it is contended that the judgment is excessive and is not sustained by the evidence. We have examined both of the abstracts and the bill of exceptions, and find therein competent evidence tending to establish the fact that for a period of about four years the defendant Ksensky frequently sold intoxicating liquors to plaintiff's husband, by the drink, in his saloon, and by the bottle, which Essex took to his home and drunk upon his own premises; that he thereby became so frequently intoxicated as to cause his employers to discharge him; that his health was impaired, and his earning capacity was practically destroyed thereby. It also appears that Essex was a carpenter by trade, and when not under the influence of intoxicating liquor was a skilled workman, capable of earning from \$600 to \$800 a year, which he contributed to the support of the plaintiff and their minor children. Disinterested witnesses, who had per-

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sonal knowledge of the facts, testified that before Mr. Essex became addicted to the excessive use of intoxicating liquors, and before the sales in question were made to him, his family was in comfortable circumstances; that after that time things gradually grew worse with them, until they actually suffered for the want of suitable food and clothing; that the plaintiff was compelled to go out to menial domestic service in order to furnish food and clothing for herself and children; that thereby she could only purchase cast-off clothing from charitable organizations; that this condition continued until this action was commenced, since which time Essex has been unable to procure liquor from the defendant, has been doing better, and is again able to support his family. In view of this testimony, we cannot say that the verdict is excessive, and is not sustained by the evidence.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

**AUGUST DECK, APPELLANT, v. PETER KAUTZ ET AL.,
APPELLEES.**

FILED DECEMBER 14, 1911. No. 16,577.

Intoxicating Liquors: ACTION ON BOND: COSTS. In an action for damages on a saloon-keeper's bond, a plaintiff is not entitled to recover his costs if the verdict in his favor is less than \$200. *Rosenbaum v. Dunston*, 16 Neb. 111.

APPEAL from the district court for Wayne county:
ANSON A. WELCH, JUDGE. *Affirmed.*

William V. Allen and William L. Dowling, for appellant.

H. E. Siman and Sullivan & Rait, contra.

LETTON, J.

The plaintiff recovered a verdict and judgment for \$74.30 in an action on a saloon-keeper's bond. He moved the district court for a judgment for his costs. This motion was overruled, and it was ordered that each party pay his own costs. From this order plaintiff appeals.

The only point we think involved was settled in *Rosenbaum v. Dunston*, 16 Neb. 111. We are content to adhere to the rule announced therein.

The judgment of the district court is

AFFIRMED.

ROSE, J., not sitting.

ROTHCHILD & COMPANY, APPELLANT, v. A. M. VAN ALSTINE ET AL., APPELLEES.

FILED DECEMBER 14, 1911. No. 17,078.

1. **Chattel Mortgages: VALIDITY: BONA FIDE PURCHASERS.** "When the possession of property described in a chattel mortgage remains with the mortgagor, and the mortgage, or a copy thereof, is not filed as required by section 14, ch. 32, Comp. St. 1893, the mortgage is absolutely void as to creditors of the mortgagor, no matter whether they have actual notice of the mortgage or not." *Farmers & Merchants Bank v. Anthony*, 39 Neb. 343.
2. —: **ATTACHMENT: PRIORITIES.** A purchaser at a sale under attachment proceedings of chattels covered by an unfiled mortgage, without notice of the existence of such mortgage, takes the property discharged of the mortgage lien.

APPEAL from the district court for Cedar county:
GUY T. GRAVES, JUDGE. *Affirmed.*

Wilbur F. Bryant, C. H. Leech and Burr, Greene & Greene, for appellant.

H. E. Burkett, contra.

LETTON, J.

In January, 1909, Rothchild & Company, a corporation doing business in Chicago, sold to defendants Van Alstine, who were residents of Hartington, Nebraska, a Meister piano, the purchase price of which was payable in monthly instalments according to the provisions of a note and chattel mortgage then executed by the purchasers. The mortgagors retained possession of the piano. Afterwards it was seized in attachment proceedings against the Van Alstines, and, with other personal property levied upon, was on March 26, 1910, sold at public auction under the order of sale to defendant Cornelius M. Olsen for the sum of \$140. The evidence shows it was worth about \$200 at the time. The mortgage was not filed until after the sale. Shortly afterwards this action in replevin was begun by the mortgagee to recover possession of the piano from Olsen. The case was tried to the court without the intervention of a jury. The court found for the defendant Olsen and rendered judgment accordingly.

Plaintiff contends that the finding is contrary to the law and evidence, and that the court erred in refusing to permit proof that the Van Alstines were not nonresidents of the state at the time the attachment proceedings were begun. Plaintiff's theory of the case seems to be that because it had employed Mr. H. E. Burkett to collect instalments due from the Van Alstines on the piano, which employment ceased in October, 1909, the attachment proceedings, which were begun by him in March, 1910, were brought with notice to the attaching creditors of the existence of the mortgage; that actual notice was afterwards given to him by Mrs. Van Alstine, and that, consequently, Olsen was not a purchaser in good faith without notice. There is no force in this contention. Under section 14, ch. 32, Comp. St. 1911, the piano being in the possession of the mortgagor and the mortgage being unrecorded, it was "absolutely void as against the

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creditors of the mortgagor, and as against subsequent purchasers and mortgagees, in good faith." Olsen purchased the piano before the mortgage was recorded. He testifies positively that he never talked with Burkett, or with Hoese & Mengshol, the creditors, about it; that he did not know where the Van Alstines procured it or that they owed anything on it, and that he had no knowledge or information that the plaintiff had a chattel mortgage or any other kind of a lien on the piano. Having purchased the piano before the mortgage was recorded, and without notice of the existence of that instrument, he is a *bona fide* purchaser, and the mortgage was absolutely void as to him. The plaintiff's evidence was insufficient to show notice, and the burden of proof of this fact was upon it. *Rogers v. Pierce*, 12 Neb. 48. The case is ruled by *Farmers & Merchants Bank v. Anthony*, 39 Neb. 343; *Spaulding v. Johnson*, 48 Neb. 830; *Meyer & Raapke v. Miller*, 51 Neb. 620; *Vila v. Grand Island E. L., I. & C. S. Co.*, 68 Neb. 222; *Johns v. Kamarad*, 2 Neb. (Unof.) 157.

As to the second point, the court did not err in excluding this proof. The offer was made on the plaintiff's main case. The answer was a general denial. This testimony could only become admissible in case the defendant sought to justify under the attachment proceedings, and until such a defense was made the proof was irrelevant and immaterial. The offer was not renewed in rebuttal to meet this issue.

We find no error in the judgment, and it is therefore

AFFIRMED.

WILL G. WORTH, APPELLANT, v. HARRY B. WARE ET AL.,
APPELLEES.

FILED DECEMBER 14, 1911. No. 17,108.

1. Landlord and Tenant: RIGHTS OF SUBTENANT. Ordinarily a subtenant has no greater rights in the leased premises than the original tenant.

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2. ———: ———: ACTION FOR DAMAGES. A sublessee may not recover damages from his lessor for interference by a third person with his possession and business, when he has not been ousted and no wrongful act of his lessor has been proved.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Affirmed.*

Burr, Greene & Greene, for appellant.

Field, Ricketts & Ricketts, Stewart, Williams & Brown,
W. C. Frampton and Robert A. Moore, contra.

LETTON, J.

Kellogg and Bratt, who are the owners of a three-story building in the city of Lincoln, executed a lease on the same from May 1, 1907, to April 30, 1912, to Cole-McKenna Company. This controversy is over the possession of a part of the ground floor room. In 1908 Cole-McKenna Company verbally sublet a back room on the premises to C. A. Green, to be used for a barber shop, at a rental of \$15 a month. On May 12, 1909, Cole-McKenna Company subleased to R. A. Moore a part of the front room from June 1, 1909, to the expiration of the Cole-McKenna Company lease, and on May 28, 1909, Moore sublet to Green a portion of this space, extending along one side and to the front of the room, at a rental of \$75 a month. This lease was immediately assigned by Green to Worth, the plaintiff in this case. In March, 1909, Green had sold his fixtures, good-will and right to the possession of the back room, which he then occupied, to Worth for \$1,750. Afterwards the defendant Ware, with the consent of Kellogg and Bratt, and at an increased rent, procured an assignment from the Cole-McKenna Company of their lease, and took possession under the same; Worth at that time being in possession of the part of the front room which Green had subleased from Moore. A controversy arose between Ware and Worth with reference to the rights of the latter in the premises,

and Ware interfered with Worth's possession and use of the property to the detriment of his business. Worth then filed a petition in equity setting forth the facts of the lease and subleases, the consent of Kellogg and Bratt thereto, his rights in the premises, the interference with his possession and damage to his business by Ware, that a multiplicity of actions would be necessary to determine the several rights of the parties, and the inadequacy of a remedy at law, and prayed that the rights of the parties be determined, his possession protected, and his damages ascertained and adjudged.

The pleadings are too extensive and involved to be set forth in this opinion, the petition alone covering 19 typewritten pages. The district court made detailed and lengthy findings in conformity with the facts herein recited; finding, also, that Ware is in default to Cole-McKenna Company for payments due them under the lease, and that Cole-McKenna Company have a right to take possession of the premises leased to him; that Cole-McKenna Company are in default to Kellogg and Bratt, and that Worth owes two months' rent to Cole-McKenna Company; that plaintiff is entitled to recover \$150 against Ware for damages, against which \$75 due Ware for rent is offset, leaving \$53, for which he is awarded judgment against Ware, but finding, also, he is not entitled to any damages against the other defendants. It is adjudged that, if Cole-McKenna Company fail to comply with the terms of their lease with Kellogg and Bratt, Worth may do so and be subrogated to their rights thereunder. The decree was afterwards modified on plaintiff's motion so as to provide that the rights and liabilities between the plaintiff and defendants Moore and Green on account of any subsequent ouster be reserved for future action, and Ware was perpetually enjoined from further prosecuting an action then pending against the plaintiff for forcible entry and detention. It appears that after the decree plaintiff was ousted on account of default in the payment of the rent due Kellogg and Bratt.

A single point only is presented by the appeal, which is that the court erred in not entering judgment for the plaintiff for his actual damages. The first point argued in the appellant's brief is that the action was of such a nature that a court of equity should take full cognizance of it, and having assumed jurisdiction should retain it and grant complete relief, and, further, that, this being so, it is proper and right that damages be awarded to the full extent shown by the evidence. These propositions are elementary and it is unnecessary to spend time in discussing them. The plaintiff's principal complaint seems to be that the amount of damages awarded is insufficient under the evidence, and that those awarded were only against defendant Ware, while he is entitled to damages against all the other defendants as well.

So far as Kellogg and Bratt are concerned, the court made no mistake in failing to award damages against them. It is clear that Worth was a subtenant of the Cole-McKenna Company through Moore. He paid his rent to them, and after they assigned their lease to the defendant Ware he paid his rent to Ware. Worth was bound to take notice of the existence of the terms and conditions of the lease to Cole-McKenna Company, and his tenure was subject to all the terms and conditions that the original lease imposed upon the lessee. *Blachford v. Frenzer*, 44 Neb. 829. When the rights of Cole-McKenna Company under the lease terminated by a failure to perform the conditions thereof, his rights also terminated. There is no evidence to show that Worth ever acquired any rights to the possession of the premises from Kellogg and Bratt independent of the lease to Cole-McKenna Company, and there is nothing in the fact of his possession or his subtenancy which prevented Kellogg and Bratt from enforcing the terms of the original lease, even though it operated to oust Worth from his subtenancy.

As to the defendant Green: At the time that Green sold the fixtures, good-will and business to Worth he was occupying the back room only. The lease for part of the

front room was not executed for some time afterwards, although it was no doubt understood between Green and Worth that the lease should be procured. Green never took possession under the lease from Moore, but merely assigned it to Worth. At the time this action was begun Worth was in possession. He was still in possession at the time of trial and decree. On what basis then is he entitled to recover damages against Green? He had not been evicted. He was fully aware that Moore was a subtenant, and what has been said before with respect to his relations to Kellogg and Bratt under the Cole-McKenna Company lease applies equally to his relations with Green and Moore. Plaintiff has not pointed out in what respect the assessment of damages against Ware is erroneous. The damages to his business caused by the annoying acts of Ware are difficult of ascertainment, and, in the absence of anything to show wherein the judgment was wrong in this respect, we are inclined to the view that the \$150 allowed by the district court is a fair estimate. We have no doubt that the plaintiff has lost a great deal more than the damages awarded to him, but are inclined to think that this has resulted largely from the fact of his paying a good round sum for a business, location, fixtures, and good-will, the stability and permanency of which depended upon the insecure foundation of a sublease from a tenant whose financial standing was uncertain and who was not able to comply with the terms of the lease. A court of equity cannot remedy lack of caution and prudence in business transactions, and, while we regret the unfortunate plight of the plaintiff, we are unable to offer him further relief than that granted by the district court.

The judgment of the district court is

AFFIRMED.

FAWCETT, J., not sitting.

**MILTON L. THACKABERRY, APPELLANT, v. PORTS WILSON,
APPELLEE.**

FILED DECEMBER 14, 1911. No. 16,502.

Pleading: SUFFICIENCY AFTER JUDGMENT. A counterclaim filed in justice court to recover compensation for services alleged to have been rendered the plaintiff by the defendant in selling the plaintiff's real estate may sustain a recovery, where no objection was made before judgment to the sufficiency of the demand, and the record fails to affirmatively disclose that the agreement does not comply with the provisions of section 74, ch. 73, Comp. St. 1911, which requires such contracts to be in writing, signed by the owner and the agent, and to describe the land and the broker's compensation.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

George W. Berge, for appellant.

O. B. Polk, contra.

Root, J.

The plaintiff contends that a cross-demand in justice court, where this action was commenced, does not state facts sufficient to sustain the judgment in the defendant's favor. The demand is as follows: "The defendant further alleges that there is due him from the plaintiff on account of services rendered by defendant to plaintiff in the sale of plaintiff's real estate. That plaintiff agreed to pay the defendant the reasonable value of said services which was \$180, no part of which has been paid. Said services were rendered during the years 1903, 1904, and 1905. Defendant prays judgment for \$180, interest and costs."

No request was made to require the defendant to make his demand more definite and certain, nor does the record disclose that the contract is oral. Sufficient appears from the pleading to warn the plaintiff that he was

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being sued for compensation demanded by the defendant for bringing about a sale of the plaintiff's property. Section 74, ch. 73, Comp. St. 1911, requires that such contracts shall be in writing, subscribed by the landowner and the broker, and shall describe both the land and the compensation to be paid the agent. In *Schmid v. Schmid*, 37 Neb. 629, we held that "A petition alleging an agreement within the statute of frauds, but not alleging that such agreement was in writing, is sufficient after judgment." We think the rule should apply to the instant case. The contract may be in writing and comply with every requirement of the statute; the record does not otherwise disclose, and we should not presume that the justice of the peace would have rendered judgment upon an oral contract.

The argument that the services were rendered in Chicago and no liability attached thereby because of the defendant's failure to comply with alleged ordinances of that city is immaterial in the state of the record.

There is no error in the record, and the judgment of the district court is

AFFIRMED.

PAUL CLEMONT, APPELLANT, V. CUDAHY PACKING COMPANY ET AL., APPELLEES.

FILED DECEMBER 14, 1911. No. 16,560.

1. **New Trial: NEWLY DISCOVERED EVIDENCE.** Newly discovered evidence not relevant to the issues joined will not sustain an application for a new trial based solely on that discovery.
2. ———: ———: **DILIGENCE.** A petition for a new trial based solely upon the discovery of new evidence is insufficient unless the facts and circumstances pleaded will sustain a finding that the petitioner exercised diligence in endeavoring to procure such evidence before the trial.

APPEAL from the district court for Douglas county:
LEE S. ESTELLE, JUDGE. Affirmed.

Myron L. Learned and Alfred G. Ellick, for appellant.

Greene, Breckenridge, Gurley & Woodrough, contra.

ROOT, J.

This is a proceeding by petition to secure a new trial in an action at law.

In December, 1905, the plaintiff, while in the defendant corporation's employ in its packing house, was stationed at or near the corner of a rectangular block, and directed to remove therefrom the sides of half-carasses of slaughtered hogs remaining after the ham and shoulder had been severed therefrom by a cleaver wielded by another employee. About 500 pieces of meat an hour were to be thus removed. The plaintiff was furnished by the defendant corporation with an iron hook about three inches in length, and, because of his position with reference to the man using the cleaver and another servant whose duty it was to remove the severed ham, it was necessary for the plaintiff to reach across the line theretofore traversed by the cleaver. While the plaintiff was attempting to remove a side of meat, the man with the cleaver, without warning the plaintiff, and while striking a second blow to completely sever a ham, struck the plaintiff across the wrist with the cleaver and severely injured that member.

June, 1906, the plaintiff commenced an action in the district court for Douglas county against his employer and Mr. Novicki, the man who handled the cleaver, to recover for those injuries, which he alleged were caused by the defendants' negligence in the following particulars: That the plaintiff was directed by his foreman to change from a much less hazardous employment to the one in which he was injured, and, although the plaintiff was inexperienced and ignorant of the hazards of the last employment, his employer negligently, carelessly and wrongfully failed to warn or instruct the plaintiff, negli-

gently furnished an unsafe hook to work with, and negligently failed to furnish him a safe place to work in.

The defendants in the law action, in separate answers, denied the allegations of negligence, pleaded the plaintiff's alleged assumption of risk and contributory negligence, and the defendant corporation pleaded the alleged negligence of the plaintiff's fellow servant. To these answers replies in the nature of a general denial were filed. March 27, 1907, after the cause had been tried during three days, the trial judge, in response to separate requests, directed the jury to return a verdict for the defendants. Ordinary motions for a new trial filed March 30, 1907, were overruled July 30, 1907. The plaintiff alleges that for the first time he learned on June 30, 1908, that at the time he was injured the defendant corporation had no rule requiring the man with the cleaver, whenever it was necessary to strike a second blow to sever a half-carcass, to notify or otherwise warn the other men working around the chopping block, and on the same day for the first time learned that the man with the cleaver did not entirely sever the parts of the carcass with the first stroke because there was a defect in the chopping block, in this, that its surface was not smooth and the edge of the cleaver blade could not come in contact with the block along the length of the blade; that the plaintiff was unable during the former trial to produce testimony to prove these facts because the persons having knowledge of the facts refused to advise the plaintiff, although repeated efforts were made to obtain a statement from them, but he was unable to do so, and they refused to discuss the plaintiff's case with him or his attorney, and the witnesses produced could not testify to the facts; that no evidence was produced during that trial to prove the nonexistence of the rule or the cause for Novicki's failure to sever the one half-carcass with one stroke; that the newly discovered evidence is material, and, if it had been produced, would have changed the verdict; that the plaintiff could not with the exercise of reasonable dili-

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gence discover and produce such evidence, but, if permitted, will prove the facts by the evidence of witnesses who did not testify on the former trial. A general demurrer to this petition was sustained, and, the plaintiff electing not to plead over, the proceeding was dismissed.

Counsel for the plaintiff say that this action is prosecuted under the provisions of section 318 of the code, which, among other things, provides for a petition for a new trial because of newly discovered evidence. The allegations in the petition will be considered denied without answer, and the case will be summarily determined during the next term. The litigant moving for the new trial should introduce the evidence adduced during the former trial as well as the newly discovered evidence. *Omaha, N. & B. H. R. Co. v. O'Donnell*, 24 Neb. 753. Ordinarily it will not be practical to state within the limits of a petition the testimony adduced during the former trial, so that a demurrer thereto will advise the district court or this court on appeal concerning the scope and quality of that evidence. A demurrer to such a petition is not ordinarily to be commended, but, where the showing made is clearly insufficient to justify granting a new trial, it may properly be filed. For the purposes of this case we must assume that the plaintiff during the trial of his case did not introduce sufficient evidence to sustain his allegation to the effect that the defendants were negligent, or, that, if he did, the proof of his contributory negligence was conclusive. In other words, the plaintiff's allegations in his present petition that the evidence adduced during his former trial disclosed facts from which a jury might lawfully find the defendants liable cannot prevail against the judgment in their favor. None of the alleged newly discovered evidence is relevant to any issue joined by the pleadings upon which the demand was tried, and hence it is immaterial. A new trial will not be granted for newly discovered evidence unless it is material. *Butterfield v. City of Beaver City*, 84 Neb. 417.

Furthermore, there is no such showing of diligence as will justify granting the plaintiff a new trial. Facts and circumstances, and not the litigant's conclusions, must be alleged, so that the court may determine whether reasonable diligence was exercised. The plaintiff alleges that none of his witnesses knew of the alleged defect in the chopping block or that the corporation defendant had not promulgated the rule he now asserts was necessary for his protection, but he does not state the names of the witnesses produced at the former trial or what relation they sustained to the defendant corporation, nor does he reveal the names of the alleged newly discovered witnesses, nor their relation, present or past, to the plaintiff's former employer. Clearly he did not call as witnesses those individuals who were working with him about the block, because if it be a fact that the table was defective, as he alleges, and it be conceded for the sake of argument that such defect was a proximate cause of his injuries, they would have known that fact. There is no allegation that either defendant suppressed evidence or interposed any obstacle to the plaintiff or his attorney in such investigations as may have been made to ascertain the facts. If a rule were necessary for the protection of the plaintiff and his fellow workmen, he knew that fact, or should have known it, before the case was tried.

No court can, from a consideration of all of the facts well pleaded in this petition, say that the plaintiff exercised reasonable diligence to ascertain and plead before his trial the facts which he contends creates a cause of action in his favor. Unless the petition discloses such facts that the court can say from their consideration that the plaintiff exercised reasonable diligence, it is fatally defective. *Todd v. City of Crete*, 79 Neb. 677.

There is no error in the record, and the judgment of the district court is

AFFIRMED.

STEPHEN SCHULTZ, APPELLANT, v. HASTINGS LODGE NO. 50, INDEPENDENT ORDER OF ODD FELLOWS, ET AL., APPELLEES.

FILED DECEMBER 14, 1911. No. 16,773.

1. **Contracts: CONSTRUCTION: LEASES.** Whether an instrument is an agreement to enter into a contract of lease or is a contract of lease is a question of construction to be ascertained from a consideration of its terms in the light of the surrounding circumstances.
2. ———: ———: **CONTRACT FOR A LEASE.** An agreement in writing, containing no apt words of present demise, wherein one party agrees to construct a building upon a definitely described parcel of land and to lease the basement and first story of the structure to the other party, and reciting that a lease shall subsequently be executed, and wherein the other party "agrees on his part to enter into a contract of lease for the above described and named building," when considered in connection with the facts stated in the opinion, is construed to be a contract for a lease.
3. ———: ———: **INTEREST IN LAND.** This contract did not create an interest in the real estate therein described.
4. ———: **CONTRACT FOR A LEASE: BREACH: REMEDIES.** For a breach of a contract to lease, the expectant tenant may maintain an action for damages, or, in a proper case, for the specific performance of the contract.
5. ———: ———: **ABANDONMENT.** The mutual rights of the parties to a contract for a lease may be waived and extinguished by oral declarations and other acts of the parties clearly evincing a purpose to abandon the contract.
6. **Specific Performance: CONTRACT FOR A LEASE: ABANDONMENT.** A court of equity will not decree a specific performance of a contract to lease, where the expectant tenant's declarations and conduct were such as to induce the landlord in reason to believe that the contract had been abandoned, and the proprietor, in reliance upon that conduct, leased the premises to another party.

APPEAL from the district court for Adams county:
GEORGE F. CORCORAN, JUDGE. Affirmed.

John C. Stevens, for appellant.

J. W. James, Karl D. Beghtol, H. F. Favinger, W. R. Burton and Tibbets, Morey & Fuller, contra.

Root, J.

This is an action to compel a specific performance of a contract and for an injunction. The defendants prevailed, and the plaintiff appeals.

In 1909 the plaintiff was, and he still is, engaged in selling at retail automobiles and farm implements at Hastings, Nebraska. The defendant, Hastings Lodge Number 50, I. O. O. F., a corporation organized under the provisions of section 165 *et seq.*, ch. 16, Comp. St. 1909, in 1909 owned four lots in that city. In January, 1909, the defendants Messrs. U. S. Rohrer, J. F. Heiler, C. C. Keith, and J. H. Vastine, members of that corporation, were appointed as a committee to investigate and to report to the lodge whether sufficient funds could be pledged to construct a building upon those lots, and to secure a desirable tenant for that part of the proposed building which the lodge desired to lease. February 4, 1909, the committee, after negotiating with the plaintiff, signed a document upon which he declares in the instant case. It is as follows: "Hastings, Nebr., Feb. 4, 1909. This memorandum of agreement, entered into Feb. 4, 1909, between Hasting Lodge No. 50, I. O. O. F., of Hastings, Nebr., and Stephen Schultz of Hastings, Nebr., witnesseth: That said first party agrees to promptly begin the erection of a brick building 60x106 feet on the corner of Burlington ave. and Second street, Hastings, Nebr., to press same to early completion, and to lease the basement and first floor of said building to said second party, together with the adjacent grounds on the west, for a period of ten years for the agreed rental of \$1000 per year, lease to that effect to be executed between the parties before the commencement of work on the building. And Stephen Schultz, the said second party, hereby agrees on his part to enter into a contract of lease for the above described and named building, at the rental of one thousand dollars per year payable monthly in advance, for the term of ten years, from the date of entry into said

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building. Each party hereto, binds itself and himself to the strict performance of the conditions of this contract in the penal sum of five hundred dollars, the same to be collectible from the defaulting party hereto. To the performance of these agreements the parties hereto pledge themselves their successors and assigns. In witness whereof we have subscribed the same this 4th day of February, 1909. U. S. Rohrer, C. O. Keith, J. F. Heiler, J. H. Vastine, Committee of Hastings Lodge No. 50, I. O. O. F., S. Schultz."

Among other statements, there was indorsed upon the document before it was signed these words: "That elevator shall be installed." It is conceded that this clause became part of the contract, if a contract was made. Subsequently the committee, having failed to secure sufficient encouragement in their attempt to raise funds, reported the fact to the lodge, and submitted the memorandum of contract. Thereupon the lodge abandoned its project, sold the lots to Mr. Rohrer, and subsequently, in accordance with his instructions, conveyed them to the defendant Fraternity Building Association, a corporation organized by Messrs. Rohrer and his associates for the purpose of acquiring the lots and constructing the building thereon. Rohrer agreed to hold the lodge harmless on account of the penalty in the contract, but the evidence does not reveal whether that agreement was in writing. There is no recital in either deed concerning the contract, or that Schultz had or claimed any interest in the property. Rohrer and Heiler are directors of the Fraternity Building Association and largely control its affairs.

The plaintiff, when informed by the contractor some time prior to October 30 (the exact date not being disclosed) that a hand elevator would be installed, stated that, if this were done, he would not occupy the building. During the evening of October 30 one of the plaintiff's sons, in a conversation with Messrs. Rohrer and Heiler, inquired whether a motor or a hand elevator was

to be installed, and upon being informed, sought his father, who went to Rohrer and Heiler, and, during a conversation which degenerated into an altercation, said in substance, according to the testimony of Messrs. Rohrer and Heiler, that he did not have to take the building, but would construct one for himself on a vacant lot across the street, that an attempt was being made to keep him out of the building, and that the contract had been violated. Schultz and his sons, Harry and Walter, testify that nothing was said by their father during the conversation with Heiler and Rohrer about not taking the building, and a Mr. Tooley, who heard part of the conversation, testifies that as Rohrer and Heiler were departing, and while they were about 15 feet from Schultz, the last named person said that they were trying to compel him to give up the building. Preceding this difficulty, Mr. Rohrer delivered the contract to his counsel, the late Judge Batty, with instructions to draft a contract of lease. Judge Batty prepared duplicate drafts of a contract and delivered them with the memorandum contract with the lodge to Mr. Schultz about October 15. Monday, November 2, Mr. Schultz, without comment, returned the contract and the copies to Judge Batty.

November 5, 1909, the building association and the defendant Stitt-Dillon Company, one of the plaintiff's competitors in business, executed a written contract of lease for the building at a rental greater by \$200 a year than provided for in the contract with the lodge. The Stitt-Dillon contract was recorded the day it was executed. At this time the floor of the first story was not completed and some of the interior finishing was incomplete. The defendant Stitt-Dillon Company knew that negotiations had been pending between its lessor and Mr. Schultz for that part of the building described in the contract of lease, but were told by Mr. Rohrer that they had been discontinued. The Stitt-Dillon Company immediately posted a statement, to the effect that it would oc-

cupy the premises about December 1, in a conspicuous place on the exterior of one of the outer walls. Subsequently, having been informed that the plaintiff contemplated interfering with this defendant, it, with the contractor's consent, placed an automobile in the building after a temporary injunction had been granted, but before its service, and, as the district court found on a hearing for an alleged contempt, prior to the time that defendant knew that the order had been issued.

November 6, one of the plaintiff's sons having noticed the Stitt-Dillon sign on the building, and having informed the plaintiff of the fact, the plaintiff called on Judge Batty for an inspection of the drafts of the contract of lease, and for the first time stated that they were objected to because they contained provisions not in accord with the agreement to lease, and very soon thereafter a demand was made on the defendant Fraternity Building Association that it execute to the plaintiff a contract of lease according to the terms of the contract between the plaintiff and the lodge.

The defendants Rohrer, Keith, Heiler, and Vastine filed a general demurrer to the petition, which, so far as we are advised, has not been ruled on.

The defendant lodge answered separately, disclaiming any interest in the controversy, and alleging, among other things, that the contract was invalid because not executed according to law. Counsel for the plaintiff, during the argument at the bar, stated that his client did not contend for a judgment against the lodge, and we shall give it no further consideration.

The defendant Fraternity Building Association, among things, contends in its answer that, although it did not assume any of the obligations created by the transaction between the plaintiff and the lodge, it expected and was willing to lease the basement and first story of the building to the plaintiff, and deposited the contract with its counsel to draft a contract of lease for that purpose, but, having been informed by the plaintiff

that he would not enter into a contract unless a motor elevator was installed in the building, and the plaintiff having returned the drafts prepared by Judge Batty, it understood that all negotiations with the plaintiff were at an end, and, relying upon his declarations, entered into the contract with the Stitt-Dillon Company, and thereby became incapacitated to execute the contract demanded by the plaintiff.

The defendant Stitt-Dillon Company, among other defenses, contends that it is an innocent purchaser, that the contract between the plaintiff and the lodge did not run with the land, and that its lessor was not bound thereby. The plaintiff in his reply, while denying that he surrendered his rights under the contract, contends that whatever was said with respect thereto is void under the statute of frauds because not reduced to writing and signed by him. The district court found generally in the defendants' favor, and by reference incorporated a memorandum opinion into the decree. The gist of this opinion is that the contract between the lodge and the plaintiff is an agreement for a lease and did not run with the land; that, if it be conceded that the building association assumed the obligations of this contract, the plaintiff waived any right he may have had to a contract of lease. Specific performance therefore was not granted.

The plaintiff is not entirely consistent in asserting that the contract should be construed to be a lease, and in contending that he should have specific performance of the same contract as an agreement to execute a lease. Whether an instrument is a contract of lease or an agreement to execute a contract of lease depends upon the parties' intentions, which will be gathered from all the terms of the instrument considered in the light of the surrounding circumstances. 1 Underhill, Landlord and Tenant, sec. 179; Jones, Landlord and Tenant, sec. 141; *Griffin v. Knisely*, 75 Ill. 411; *Martin v. Davis*, 96 Ia. 718. There are no apt words in the agreement considered in this case to create a present or future demise; both parties clearly

contemplated the subsequent execution of a contract in writing, and the conduct of all of the parties in interest clearly indicates that they intended the contract as one for a subsequent lease. We shall therefore consider the case on that theory.

In this view of the case, the plaintiff acquired no interest in the real estate. 1 Taylor, Landlord and Tenant (9th ed.) sec. 37. The contract, however, if valid, may be enforced by an appropriate action against those liable for its breach. One of the actions recognized by the law is for a specific performance. Assuming, but not deciding, that the defendant Fraternity Building Association adopted the contract, we think the plaintiff's conduct was such that the district court was justified in denying specific performance. The part of the building in controversy had been planned and was built for the use of a retail dealer in implements, automobiles, or other like chattels, and could not without a considerable additional outlay be prepared for a tenant engaged in ordinary mercantile business. Ordinarily tenants for that class of property are not so easily secured as for a building property constructed and finished for the retail trade.

The plaintiff's condition of mind is shown by his statement to the contractor before the altercation of October 30 that, unless a power elevator was installed, he would not take the building, and corroborates the testimony of Rohrer and Heiler that Schultz said he did not have to take their building, and would not do so, but proposed to construct one for himself. The evidence discloses that the plaintiff is a wealthy, aggressive, successful business man, and Messrs. Rohrer and Heiler might in reason believe that Schultz intended to abandon whatever rights he had in the premises. The return of the contract and the drafts of the lease to the defendant's counsel would lead the average man with knowledge of the transaction to conclude that Schultz did not intend to take the building. Possibly this conduct was intended as weighty argument in favor of the building association yielding to

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Schultz' demands, and possibly Schultz had no other purpose, but he took the chance that his declarations would be seriously considered by the officers of the building association and accepted as a correct statement of his intentions.

"A party, seeking a specific performance, must not only come to enforce a fair and reasonable contract, but must show that his own conduct in reference to the contract has been fair and candid." *Garrett v. Besborough*, 2 Dru. & Wal. (Irish Ch.) 452, 459. *Mahon v. Leech*, 11 N. Dak. 181.

If the contract was one for the purchase and sale of real estate, a court of equity might accept the plaintiff's conduct as an abandonment of his rights in the premises. *Sieker v. Sieker*, 89 Neb. 123.

We conclude, from a consideration of the entire record, that the judgment of the district court is right, and it is

AFFIRMED.

FAWCETT and SEDGWICK, JJ., dissent.

DAVID VAN ETTEN ET AL., APPELLANTS, V. FLORENCE P. LEAVITT, TRUSTEE, ET AL., APPELLEES.

FILED DECEMBER 14, 1911. No. 16,570.

Pleading: PETITION: RES JUDICATA. Where it appears upon the face of a petition that every material matter complained of has been adjudicated in former actions between the same parties or their privies, a general demurrer thereto is properly sustained.

APPEAL from the district court for Douglas county:
LEE S. ESTELLE, JUDGE. *Affirmed.*

H. H. Bowes, for appellants.

Henry P. Leavitt and William J. Hotz, contra.

FAWCETT, J.

This suit was instituted in the district court for Douglas county, to set aside a decree entered in that court, in the case of William Medland against plaintiffs, in a suit for the foreclosure of a tax lien on subplot 13 of lot 9, Capital addition to the city of Omaha. Florence P. Leavitt, trustee, John W. McDonald, as sheriff of Douglas county, and the Passumpsic Savings Bank, a corporation, were made defendants. Subsequently Charles B. McDonald, administrator of the estate of John W. McDonald, deceased, appears to have been substituted for the said John W. McDonald, whom he succeeded as sheriff. The defendants Leavitt and McDonald appeared and filed separate general demurrers to the petition. The savings bank was never served with summons; hence, neither it nor the second cause of action set out in the petition is now before us. In their brief plaintiffs say that the demurrers of defendants Leavitt and McDonald were sustained and plaintiffs' suit as to them dismissed. The record is silent as to any ruling upon the two demurrers referred to, but does contain a journal entry dismissing the action as to the defendant savings bank "and all other defendants in said action." As the parties have treated this order as having been made after a ruling upon the demurrers of defendants and an election by plaintiffs to stand upon their petition, we will treat it in like manner.

This is the fourth time that the controversy set out in the first cause of action has been before this court. The opinion, upon its first appearance, is reported in *Van Etten v. Medland*, 53 Neb. 569; upon its second appearance, in *Medland v. Van Etten*, 75 Neb. 794; and, upon its third appearance, in *Medland v. Van Etten*, 79 Neb. 49. The plaintiffs in this suit were parties and appellants in all of these appeals. The petition filed in this case shows upon its face that everything contended for was adjudicated by those decisions, and that this

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suit was evidently instituted, not for the purpose of obtaining justice, but for the purpose of affording the pleader an opportunity to give vent to his animus toward the judges of the district court for Douglas county and the judges and commissioners of this court. The character of the petition is such that if the attorney who wrote it, and who was himself one of the plaintiffs, were now living, it would be stricken from the files. There is no merit in this appeal.

The judgment of the district court is clearly right, and it is

AFFIRMED.

WILLIAM A. WAGNER, APPELLEE, V. FARMERS & MERCHANTS INSURANCE COMPANY, APPELLANT.

FILED DECEMBER 14, 1911. No. 17,001.

1. **Carriers: INJURY: EVIDENCE: CREDIBILITY OF WITNESSES.** Evidence examined and referred to in the opinion *held* sufficient to sustain the verdict and judgment.
2. **Instruction** set out in the opinion sustained.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

A. L. Chase and Greene, Breckenridge, Gurley & Woodrough, for appellant.

Stewart, Williams & Brown, contra.

FAWCETT, J.

Action for injuries sustained by plaintiff while entering and being carried in an elevator in defendant's building. Verdict and judgment for plaintiff. Defendant appeals.

Two errors only are relied upon for a reversal: "First. Whether the plaintiff is entitled to recover on the facts.

Second. The error of the learned trial judge in the eighth instruction."

In support of the first assignment it is said: "We are not asking the court to draw a different conclusion from facts than the jury drew; *we are insisting that the jury disregarded the truth and the facts*; that the account by the plaintiff of the manner in which he received the injury for which he recovered a verdict in this action is not only false, but impossible." The brief states that the jury saw the elevator, and suggests that "as it (the elevator) is only a little distance from the state capitol building, and could not well be attached to the record, we suggest the propriety of an inspection by your honors, for there has been no substantial change in the situation since the accident." We think we will have to decline the invitation to inspect the elevator, and rest the inspection upon that made by the jury. We will not extend this opinion by extensively setting out the evidence. It is sufficient to say that it is conflicting. Plaintiff testified that as he was in the act of entering the elevator with his left foot forward, and before he had taken his right foot from the hall floor, the elevator started down; that his right leg was caught by the top of the elevator door and was dragged downward between the elevator and the elevator shaft until the elevator reached an open space below, which released his leg from its imprisonment. The evidence of the physician, introduced by the defendant, is that it would have been impossible for plaintiff's leg to have been drawn through between the iron top of the door frame and the edge of the building without crushing the leg very badly and breaking the bones, and that he did not find upon plaintiff's leg enough of a scrape or scratch or bruise to leave a scar after it was cured. This testimony standing alone would, it is true, cast discredit upon plaintiff's testimony; but the jury heard plaintiff's description of the accident, and viewed the elevator and the elevator space referred to, and we cannot say that the inspection of these twelve

men was not a sufficient corroboration of the testimony of plaintiff to overcome the testimony of the physician and of other witnesses introduced by defendant. It is a well-known fact that in times of accident the victim often escapes serious injury in a manner almost miraculous. If there were a two-inch space on all sides of the elevator between the elevator and the elevator shaft, it is not impossible that, as the elevator was descending, with plaintiff's leg between the elevator and the elevator shaft, the former may have yielded sufficiently to have allowed more than the two-inch space on the side of the elevator where the leg was imprisoned. But whether that be true or not, we cannot agree with counsel that the testimony of plaintiff is so incredible and beyond human probabilities that we should substitute our judgment of its credibility for that of the jury.

The eighth instruction reads: "You are instructed that if you find that the elevator was stopped on the second floor at the place where the plaintiff was waiting, and in response to his signal, and the door thereof was opened by defendant's servant in charge of such elevator, and that, while plaintiff was in the act of entering, the elevator was started by defendant's servants, and by reason thereof plaintiff was injured, as alleged in his petition, this would be presumptive evidence of negligence upon the part of defendant, so far as such negligence is alleged in plaintiff's petition, to be overcome only by evidence which would show that the defendant was not in fault, or that the accident was due to plaintiff's own negligence or that his own negligence contributed thereto." It is said in the brief: "This instruction is vicious and prejudicial because it gave undue prominence to the plaintiff's theory of the case. It referred the jury to the contention of the plaintiff stated in his petition, and practically informs them that there was competent evidence tending to show negligence, and that such evidence creates a presumption of negligence which is to be 'overcome only,' said the court, 'by evidence

which will show that the defendant was not in fault.' In other words, having considered the facts and therefrom found that the defendant was at fault, the jury were gravely informed that the only chance for the defendant was for it to exculpate itself by showing it was not to blame." We do not think the instruction is open to the charge made against it. It does not "practically inform them that there was competent evidence tending to show negligence." What it does say, and what the court had a right to say, was that if the jury found the facts with relation to the attempted entry into the elevator by plaintiff, as set out in the first part of the instruction, those facts would constitute "presumptive evidence of negligence upon the part of defendant." In this we think the trial court was right, and, had the instruction stopped there, we do not think the defendant could have made any complaint. What followed was favorable to defendant, as it limited such presumptive evidence of negligence to the negligence charged in the petition, and states substantially that this presumptive evidence could be overcome; and the fact that the court says it could be overcome only "by evidence which would show that the defendant was not in fault, or that the accident was due to plaintiff's own negligence or that his own negligence contributed thereto," could not render the instruction prejudicial, as those qualifications were in the interest of defendant.

We think both of the errors assigned by counsel must be decided adversely to its contention. The judgment of the district court is therefore

AFFIRMED.

**CHARLES B. POWERS ET AL., APPELLANTS, V. FRED M.
FLANSBURG, APPELLEE.**

FILED DECEMBER 14, 1911. No. 16,568.

1. **Injunction: REMEDY AT LAW.** The remedy of injunction cannot be used when there are adequate remedies in the usual course of the law.
2. **Nuisance: PUBLIC NUISANCE: ABATEMENT: SPECIAL INJURY.** A private individual cannot maintain an action to suppress a public nuisance, unless he sustains some special injury caused thereby other than that sustained by the public at large.

APPEAL from the district court for Hitchcock county:
ROBERT C. ORR, JUDGE. *Affirmed.*

Perry, Lambe & Butler, for appellants.

A. A. McCoy and C. E. Eldred, contra.

SEDGWICK, J.

Three citizens and property owners in the village of Trenton began this action in the district court for Hitchcock county to enjoin the defendant from "conducting or in any manner operating and keeping open" a pool and billiard-hall in the village of Trenton. The finding and judgment were for the defendant, and the plaintiffs have appealed.

The petition alleges that the defendant's license has expired, and that he conducts the business complained of without a license; that he keeps and sells intoxicating liquors in his place of business without any license so to do, and allows drinking and swearing in his place of business, and in various ways keeps and maintains a disorderly and disreputable house, which has become and is a public nuisance. A large amount of evidence was taken, many citizens were called as witnesses, and the evidence in regard to the manner of keeping and conducting the business is somewhat conflicting, but there

is evidence tending to prove that the defendant is keeping and selling intoxicating liquors contrary to law, and maintaining a disorderly house, and doing other illegal and improper things complained of in the petition. It is stated in the brief that the village council was enjoined by the district court from repealing the ordinance which provided for licensing billiard-halls, and that prosecutions were begun against the defendant for keeping and selling intoxicating liquors without license, and that these actions have been allowed to remain in the courts without determination, and that the courts and the officers of the law are preventing the good people of the village of Trenton from enforcing the law and from putting a stop to the unlawful actions and conduct of the defendant.

The evidence shows that an action was begun by this defendant in the district court to enjoin the village council from enacting an ordinance repealing the ordinance under which he was licensed, and in that action a temporary injunction was allowed as prayed, but the evidence does not show what became of these proceedings, nor whether the action was promptly tried or was unduly delayed. The evidence also shows that a complaint was made against this defendant in the county court of Hitchcock county, charging him with unlawfully keeping intoxicating liquors with intent to sell or dispose of the same contrary to law, and that a warrant was issued, under which a search was made of the premises and certain liquors found and the defendant arrested, and that a hearing was had before the county court, and that the defendant was held to the district court for trial, and a judgment entered by the county court ordering the liquors to be destroyed. The defendant in that action then gave bond for his appearance in the district court and for an appeal to the district court from the judgment ordering the destruction of the liquors. The evidence does not show what was done in this matter in the district court. There is no evidence tending to

support the statements of the brief criticising the courts and officers of Hitchcock county.

If we consider only the allegations of plaintiffs' petition and the evidence which they introduced, it appears that the defendant has been guilty of various crimes as charged in the petition, and that he is violating the criminal law in many particulars. There seems to be a great diversity of opinion in regard to these matters as disclosed by the evidence, and we do not find it necessary to determine the preponderance of the evidence under the issues presented. The trial court made no special findings of fact. There is nothing in the petition or evidence to indicate that the criminal laws of the state are in any respect insufficient to punish the defendant and put a stop to the crimes which it is alleged he has committed, if indeed the defendant is guilty as alleged. The petition does not allege any special interest of these plaintiffs in these proceedings, as distinguished from the interest of the general public. On the other hand, it is specifically alleged that this action was brought by these plaintiffs in their own behalf and in behalf of all of the citizens of Trenton who, it is alleged, were similarly situated. Under these circumstances, it is clear that this action cannot be maintained. If the defendant persists in keeping and selling liquors without license at his place of business in Trenton, the criminal law is amply sufficient to punish such offenses. If the proper officers refuse or neglect to enforce the law, a remedy is provided other than by injunction. If a public nuisance is maintained that affects alike all the members of the community, the public authorities may deal with it, but these plaintiffs have not shown such an interest as will enable them to maintain this action. If the village authorities were improperly enjoined by the district court, the remedy is by appeal, and a review of those proceedings cannot be had in another and independent action. The plaintiffs have failed to allege or prove sufficient grounds, or, in fact, any necessity, for the extra-

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ordinary writ of injunction; nor have they shown any special interest, as distinguished from the interest of the general public.

The judgment of the district court is

AFFIRMED.

FRED NEICE, APPELLEE, V. FARMERS CO-OPERATIVE CREAMERY & SUPPLY COMPANY, APPELLANT.

FILED DECEMBER 14, 1911. No. 17,003.

1. **Master and Servant: INJURY TO SERVANT: RIGHT TO USE PREMISES.** An employee in a business in which a steam boiler is used is not a mere licensee in going into the boiler room where conveniences for the use of the employees are established, and they are accustomed to use the same with the knowledge and consent of the employer.
2. ———: ———: ———: **QUESTION FOR JURY.** Under such circumstances, if an employee remains in said boiler room during the rest hour, with the implied permission of the employer, he is entitled to the ordinary protection of an employee, and it is a question for the jury, upon substantially conflicting evidence, whether the employer has so consented.
3. ———: ———: **NEGLIGENCE OF EMPLOYER.** If the employer is guilty of negligence by which an employee is injured while in such boiler room, it is immaterial that the employer did not know that the employee was in the boiler room at that particular time and liable to be injured by such negligence. It is sufficient if he knew that the employees were at times properly in said boiler room.
4. ———: ———: ———: **QUESTION FOR JURY.** If the employer allows an inexperienced man to operate the valves of a steam boiler and let the steam pressure with such force into a steam trap as to cause an explosion of the trap, and the trap is shown by the evidence to be of proper construction and suitable for the purpose for which it was intended, and the gauges upon the boiler for determining the steam pressure are so placed that the operator cannot observe them, it is proper to submit to the jury the question of the employer's negligence as to the cause of the explosion.
5. **Appeal: INSTRUCTIONS.** It is not reversible error to instruct the

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jury that the employer should "use every reasonable precaution" to safeguard his employees, if the instructions as a whole fully and properly define negligence and ordinary care.

6. **Witnesses: PRIVILEGED COMMUNICATIONS.** Defendant offered to prove by the physician statements alleged to have been made by plaintiff to the physician some time after he treated him for the injuries complained of. *Held*, That it was not an abuse of discretion to exclude this evidence as privileged under the circumstances stated in the opinion.
7. **Damages.** Upon the evidence indicated in the opinion, it is *held* that the verdict for \$3,000 damages is not so excessive that this court must say as matter of law that the judgment is clearly wrong.

APPEAL from the district court for Douglas county.
WILLIS G. SEARS, JUDGE. *Affirmed.*

Montgomery, Hall & Young, for appellant.

Sullivan & Rait, contra.

SEDGWICK, J.

The plaintiff was employed by the defendant in its butter factory in Omaha. He was injured by the explosion of a steam trap, and brought this action to recover damages. The jury rendered a verdict in his favor for \$3,000, and from the judgment entered thereon the defendant has appealed.

The defendant, in the manufacture and sale of butter and ice cream, occupied a three-story building with basement, and employed an engineer, fireman, butter-makers and other workmen. The plaintiff was employed in what was called a "churn room." The accident complained of occurred in what was called the "boiler room." In this latter room there is a trap or basin which is connected with cast iron pipes with the boiler, and also by similar pipes with the public sewer. It is used for "draining or blowing off the boiler." In so using it, the engineer opens the valves in the boiler and permits the steam and water to pass into the pipe, and thence to the

sewer. The trap is covered by a circular steel or cast-iron plate two or three feet in diameter and an inch in thickness, secured to the trap by bolts which are set in the concrete floor. When the accident occurred, the plaintiff was in the boiler room, and had just finished eating his lunch and was standing near the trap. In the absence of the engineer, the fireman, as appears to have been his custom under such circumstances, opened the valves communicating with the trap, and the explosion occurred, causing the plaintiff's injury. The plaintiff alleges that the fireman "did negligently and recklessly open the blow-off valves and cocks of the boiler and permitted great quantities of steam and water under enormous pressure to pass from the boiler into said basin," which caused the explosion. The defendant insists that the verdict and judgment are not supported by the evidence.

1. It is said that the plaintiff "while in the trap room eating his lunch was a mere licensee, and, there being no proof of wanton or wilful injury to him by appellant or its fireman, appellee cannot recover." The churn room where the plaintiff worked was cold and not a suitable place for resting and lunching during the noon hour. A few months before the accident happened it had been the custom of the workmen, generally, to use the boiler room for this purpose, but the company had prepared another room on the floor above, which room was at the time of the accident more generally used by the employees. The closets for the use of the men, however, were in the boiler room, and these were being used generally at the time of the accident. The men were supposed to go into the boiler room to use these closets, and the plaintiff was not a mere licensee in so doing. The engineer testified that the men were not expected to remain in the boiler room during the noon hour, and that he had so instructed the plaintiff, and had frequently directed him not to remain in the boiler room for eating his lunch. The defendant's foreman testified

that he had never given the men such orders, and the plaintiff positively denied that he had ever received any such directions. Under this conflicting evidence, the jury might have found that the plaintiff was not violating any rules of the company in remaining in the boiler room during the lunch hour, and that he was not a mere licensee therein.

2. The allegation of the plaintiff that the fireman, Reisberg, knew that the plaintiff was in the trap room at the time that the accident occurred is not supported by the evidence. The fireman testified positively that he had no such knowledge or notice, and there appears to be no direct evidence that he did. The fireman, however, was bound to know, and the evidence indicates that he did know, that the closets in the boiler room were designed for the use of the men and that they were so used, and that it was reasonable to expect that the men might probably be in the boiler room at any time. It is not therefore necessary that he should know at that particular time that this plaintiff might be exposed to danger by his carelessness.

3. The principal question in this case is whether there is sufficient evidence from which the jury might find negligence on the part of the fireman, Reisberg, in opening the valves and allowing the steam to escape in the trap in the manner in which he did. The evidence shows that this trap was suitable and properly constructed in the ordinary manner, and had been continuously in use for some time, but its construction, as above stated, conclusively shows that it was not intended to sustain the force of the full boiler pressure, and was incapable of doing so; if submitted to such pressure, there must necessarily be an explosion. It appears that there were steam and water-pressure guages upon the boiler, but these were so located that they could not be seen by the person operating the steam valve. The custom was that another person should watch these guages while the steam was being admitted to the trap, but this custom

was not always observed. On this occasion, the engineer being absent, the fireman undertook to "blow off" the boiler. It appears that he had done this at other times in the engineer's absence. The evidence shows that he had some experience in taking care of and operating the boiler, but he had been but a short time in that employment, and was not an experienced engineer. The plaintiff contends that not to have another person watching the gauges and notifying the operator of dangers was in itself negligence. It may be that a skilled engineer in operating the valves could, from his experience, judge the pressure he was causing upon the steam trap with sufficient accuracy to avoid danger of an explosion. If the jury so found, they might still consider that to allow an inexperienced man to operate these valves without another to observe the gauges, and without means of knowing the dangerous pressure upon the steam trap, was negligence. It cannot be said that there is such a failure of evidence as to require the court to determine this point as a question of law.

4. In the eighth instruction the court told the jury: "You are instructed that a workman, during the hours of his service, whether at the noon hour, or hour of work, while at such places as is usual for such employees as he was, had a right to rely upon the fact that the employer will take every reasonable precaution looking to the safeguarding of such places as safe places to be." It is said that this is wrong, because the law "only requires reasonable care and prudence in providing a safe place." It is perhaps not usual to use the word "every" in such instruction, and the language suggested in the brief is more accurate. Construing the instructions together, they so define negligence and reasonable and ordinary prudence that it seems impossible that the jury could have been misled by the instruction complained of. In the fifth instruction the jury were told: "By 'negligence' is meant the doing of some act, under the circumstances surrounding the accident involved

which a man of ordinary prudence would not have done; or it is the failure to do some act or take some precaution which a man of ordinary prudence would have done or taken under the circumstances." And it is also said in this instruction: "By 'ordinary care' is meant that amount or degree of care which common prudence and a proper regard for one's own safety or the safety of others would require under the circumstances." The issue as to the defendant's negligence was plainly and properly stated to the jury.

5. The physician who treated the plaintiff after the accident was, while upon the witness stand, questioned by the defendant as to statements that he had heard the plaintiff make, a short time before the trial, in regard to his injuries. This was objected to as calling for a privileged communication, and the objection was sustained. This ruling is complained of, and it is said that the relation of physician and patient had terminated a long time before the statements of plaintiff which it was sought to prove, and that therefore the question was not privileged. It appears that two other physicians employed by the defendant were examining the plaintiff, and the plaintiff's former physician was called in by these others. The plaintiff still regarded him as his physician, and objected to his assisting the physicians employed by the defendant in obtaining evidence. The two other physicians testified to what took place upon their examination, and the trial court seems to have considered that in making statements to his former physician the plaintiff still regarded those statements as confidential. We do not think that there was such an abuse of discretion on the part of the trial court in this ruling as to require a reversal of the judgment.

6. It is said that the verdict for \$3,000 is more than the evidence will sustain. There was some conflict in the evidence as to the extent of the plaintiff's injuries and as to the probability that they are permanent. It is conceded that the plaintiff was badly scalded by the

steam; that he was rendered unconscious, and was for several days confined in a hospital. There was also substantial evidence that his hearing and his eyesight were both seriously injured, and that at the time of the trial, which was about a year after the accident, he was still suffering from the effects of the injury. There is no mathematical rule by which such damages can be computed. The matter is peculiarly within the province of the jury, and, when the evidence is conflicting, this court cannot interfere with the verdict of the jury, unless upon the whole evidence the verdict is clearly wrong.

We have not found any sufficient error in the record requiring reversal, and the judgment of the district court is

AFFIRMED.

CASES DETERMINED
IN THE
SUPREME COURT OF NEBRASKA
JANUARY TERM, 1912.

STATE, EX REL. LOUIS HUTTER, SR., APPELLEE, V. PAPILLION
DRAINAGE DISTRICT ET AL., APPELLANTS.

FILED JANUARY 3, 1912. No. 17,177.

OPINION on motion for rehearing of case reported in
89 Neb. 808. *Rehearing denied.*

PER CURIAM.

The respondent's brief in support of its motion for a rehearing has been supplemented by several instructive briefs filed by friends of the court. These briefs contain many contentions not theretofore presented in this court or in the district court. Had they been seasonably made, a more extended opinion would have been written.

Our judgment is predicated upon the narrow question of law discussed at the bar and in the original briefs and considered in our opinion. We have not foreclosed the questions for the first time presented in these briefs, but will be free in a proper case to consider and determine them, uninfluenced by the opinion in the case at bar.

Upon more mature reflection, we are inclined to the view that the evidence of public necessity therefor is insufficient to justify the writ, so far as Adams, Jefferson and Monroe streets are concerned. Our opinion is therefore modified to that extent, and the judgment of the district court, in so far as it directs the bridging of the drainage ditch at the point where it intercepts those streets, is not approved. The judgment of the district

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court is affirmed, in so far as it directs the respondent to construct a bridge with proper approaches at the point where its ditch intersects Addition street, but, in so far as it grants further relief, is reversed, and the petitions to that extent are dismissed without prejudice to another application should the facts justify.

The motion for a rehearing is

DENIED.

JOHN G. JACOBS ET AL., APPELLEES, v. FRED L. GOODRICH,
APPELLANT.

FILED JANUARY 3, 1912. No. 16,558.

1. **Appeal: CONFLICTING EVIDENCE.** There is no controlling question of law involved in this case. The evidence was conflicting. The cause was submitted to the trial jury on proper instructions. A verdict was returned in favor of plaintiffs. Where the evidence is conflicting, it is the province of the jury to decide questions of fact, and a reviewing court cannot interfere.
2. **Boundaries: ESTABLISHMENT.** Where the evidence shows without conflict that all government and plat monuments within the business district of the city of O. have been lost or destroyed and none of them can be found, that the curbstones along the streets, having been established by legal authority, are the only safe monuments by which engineers and surveyors can be guided, and that the custom of using them as such monuments, as the only available ones, has been adopted in such city, good faith measurements from them by disinterested engineers and surveyors will not be held invalid.

APPEAL from the district court for Douglas county:
GEORGE A. DAY, JUDGE. *Affirmed.*

E. C. Page, for appellant.

Hugh A. Myers, contra.

REESE, C. J.

This is an action in ejectment for a strip of ground

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a few inches in width and 32 feet in length in the rear of block 138, in the city of Omaha. Plaintiffs are the owners of the west third of lot 3, in said block, and defendant is the owner of the middle third thereof, each being 22 feet in width. On the 24th day of July, 1869, the then owners of the two parcels of land entered into an agreement that the wall of a building to be erected on the middle third of said lot should be upon the dividing line between the two holdings, one-half thereof on each side, the wall to be used as a party wall when a building should be erected by the other on the opposite side. The building then under contemplation was constructed, extending a depth of about 80 feet. A building was constructed upon the other lot, of about 100 feet depth. The lots are 132 feet in length. The partition wall was used, without dispute or misunderstanding, the whole 100 feet. In 1907 defendant made an addition to his 100-foot building, extending back to the alley, a distance of 32 feet. In extending the wall this distance, it is claimed by plaintiffs that the wall was so placed as to encroach upon their lot. A jury trial was had, when a verdict was rendered finding that "the defendant unlawfully occupies with a wall the following described property belonging to said plaintiffs, to wit: Beginning at a point at the southeast corner of the west one-third of lot three (3), block one hundred and thirty-eight (138), city of Omaha, thence north running 32 feet to the old Jacobs' wall, thence west $8\frac{1}{2}$ inches, thence running south 32 feet, thence east 11 inches to place of beginning; and that plaintiffs are the owners of said property and entitled to the possession of the same." A motion for a new trial was filed, overruled, and judgment rendered upon the verdict. Defendant appeals.

There is no distinct question of law involved in the case. From the record, it seems to have been tried with due care by the presiding judge and counsel representing the parties. There being no abstract of the record required, the case is submitted upon the bill of exceptions

and transcript, all of which we have carefully read. While the witnesses all appear to have testified with the utmost candor, yet the evidence is conflicting on practically every material point. Some objection is made as to the method of locating the boundaries of the lots by the engineers and surveyors who sought to locate the line between the lots. This arises out of the fact that the curbstones on Fourteenth and Fifteenth streets were taken as the monuments from which distances should be computed. This applies principally to Fifteenth street. The evidence shows beyond any question that all the government monuments in the business part of the city have long since been lost and destroyed, and that it is, and has been for years, the practice and custom of engineers and surveyors to accept the curbstones as the only monuments which could be found or on which reliance could be placed. As said by some of the witnesses, they were all the monuments they had for their guidance. No stakes or plat monuments remain. The curbstones having been established by lawful authority, they probably constitute not only the best, but the only satisfactory monuments.

The giving of one instruction is assigned for error. We have examined all the instructions given, and are unable to discover any prejudicial error in them. They seem to have been carefully prepared, and correctly state the law.

While, had the cause been submitted to the writer hereof as the trier of fact, the decision might not have been as returned by the jury, yet, as they were the legitimate triers of the facts, on the conflicting evidence we must acknowledge our inability to change the result.

The judgment of the district court will therefore be

AFFIRMED.

**J. ARTHUR TILLSON, ADMINISTRATOR, APPELLEE, V. CHESTER
HOLLOWAY, APPELLANT.**

FILED JANUARY 3, 1912. No. 16,691.

1. **Executors and Administrators: RIGHT TO POSSESSION OF ASSETS: EJECTMENT.** Under the provisions of section 202, ch. 23, Comp. St. 1911 (Ann. St. 1911, sec. 5067), an executor or administrator has the right to the possession of all the real estate and personal property belonging to the estate of his decedent. In order to enforce that right he may maintain ejectment against one without title and wrongfully in possession.
2. **Ejectment: ADMISSIBILITY OF EVIDENCE: PROBATE RECORDS.** Where a foreign-probated will is admitted to probate in this state by a county court having jurisdiction of the subject matter, and from which no appeal has been taken, the proceedings and decree of the probating court are admissible in evidence in an action in ejectment by the administrator of the estate of the devisee under the will.
3. **Wills: DEVISES: VESTING OF TITLE.** Where lands, which a testator had the power to dispose of by will, are devised to one who is in life at the time of the decease of such testator, the devisee becomes vested with the title thereto, subject to the probating of the will, in the absence of debts, and the probating of the will after the death of the devisee renders effectual the title in his or her estate.
4. **Ejectment: ISSUES: DETERMINATION.** Where a defendant in an ejectment suit pleads in his answer, and upon the trial offers evidence tending to prove, his purchase of the land in dispute from Ira Holloway, under whose will plaintiff claims, the payment of the purchase price and possession under the contract of purchase, it is error to decide the case without determining that issue.

APPEAL from the district court for Buffalo county:
BRUNO O. HOSTETLER, JUDGE. *Reversed.*

H. M. Sinclair and W. D. Oldham, for appellant.

J. Arthur Tillson and Fred A. Nye, contra.

REESE, C. J.

This is an action in ejectment for the possession of the

northwest quarter and the west half of the northeast quarter and the north half of the southwest quarter, all in section 3, township 10 north, of range 14, in Buffalo county. The action is prosecuted by plaintiff as administrator of the estate of Achsah Holloway, deceased. In addition to the demand for possession of the property, a claim was made for the rents and profits during the time the land was in the possession of defendant. The answer consists of a general denial of the allegations of the petition, with the averment that Achsah Holloway was never the owner of the real estate in dispute; that defendant is her son; that the land was originally purchased from the Union Pacific Railroad Company by his father, Ira Holloway, the husband of Achsah; that Ira Holloway was thereafter indebted to defendant in the sum of \$5,500, and offered the land to defendant in part payment of said indebtedness, which offer was accepted by defendant, and in the year 1884 he went into possession of the land, and has retained the open, adverse and exclusive possession thereof ever since, fencing and otherwise improving it and claiming it as his own. It is averred that Ira Holloway was never a resident of this state; that he lived in the state of Michigan, where he died testate in 1887, leaving all his property to his wife Achsah, but that the will was never probated in this state during the lifetime of Achsah Holloway; that there are no debts against the estate of Achsah; that the estate was possessed of a large quantity of personal property of the amount and value of \$40,000, in addition to which the estate owned real estate of the value of \$25,000, over the title to which there was no controversy; that Achsah never at any time claimed any interest in, or to own, the real estate in dispute, but knew of, and acquiesced in, the transaction had between her husband (defendant's father) and defendant, whereby the land was turned over to defendant on the indebtedness of Ira Holloway. The heirs of Ira and Achsah Holloway were not made parties to the suit, nor is there any prayer for affirmative relief.

The reply is, in effect, a general denial of the allegations of the answer. There was a jury trial, which resulted in a verdict finding that plaintiff was entitled to the possession of the land and for the sum of \$1 against defendant for the rents and profits thereof. After a motion for a new trial was filed and overruled, judgment was rendered in accordance with the verdict. Defendant appeals.

The points of law presented will be disposed of in the order presented in defendant's brief. It is insisted that the petition does not contain allegations sufficient to constitute a cause of action. This question was raised at the beginning of the trial by a demurrer *ore tenus* and an objection to the introduction of any evidence. This contention is based upon the fact that it is not alleged in the petition that plaintiff has a legal estate in the land, but is suing only as administrator, without an averment that the estate is insolvent. While as a general proposition it is true, as contended by defendant, that in an action in ejectment it is necessary to allege that plaintiff has a legal estate in the land, the possession of which is sought (code, sec. 626), it seems that section 202, ch. 23, Comp. St. 1911 (Ann. St. 1911, sec. 5067), has changed the rule so far as executors and administrators are concerned. This section gives the right to the possession of all real as well as personal estate of a decedent to executors and administrators, and we have held that ejectment could be maintained by them. *Dundas v. Carson*, 27 Neb. 634; *Carson v. Dundas*, 39 Neb. 503. It is true we held in *Cooley v. Jansen*, 54 Neb. 33, that the right of an administrator to the possession of the real estate of his decedent arises from its being subject to the payment of the debts of the estate, which was correct as to the cause from which the right arises, and that a homestead right was not affected by the statute, but that it did not do away with the express provision of the statute above cited. Under that statute he is entitled to the possession of nonexempt property.

If he is entitled to such possession, the law furnishes a remedy against a disseizor, which is by ejectment.

In 1 Woerner, American Law of Administration (2d ed.) sec. 293, it is said: "Where, under the statute or a testamentary provision, the executor or administrator is put in charge of the real as well as of the personal estate, any action necessary to protect the same against wrongdoers, or to recover damages for injuries thereto, including ejectment for possession, must lie in favor of such executor or administrator." See, also, 2 Woerner, American Law of Administration (2d ed.) sec. 337. It is true, as contended by defendant, that the legal title belonging to an intestate estate descends to the heir subject to the payment of debts; but, under the statute, it is equally clear that the right of possession is in the administrator until his administration is closed. This, however, is subject to the higher rights of an equitable owner, in the absence of proof that there are creditors of the estate whose equitable claims to the property take precedence over that of the equitable owner of the land. *Koslowski v. Newman*, 74 Neb. 704. The property involved in that case was personal property, but the same principle must be applied to real estate. *Emery v. Darling*, 50 Ohio St. 160.

The will of Ira Holloway, by which his estate, "both real and personal," was devised and bequeathed to Achsah Holloway, his wife, which was duly admitted to probate in the proper court of Michigan, and afterward probated in Buffalo county, was admitted in evidence over the objection of defendant. The contention against the admission of this evidence is founded upon two reasons: (1) That this plaintiff, who signed the petition for its probate, had no authority to do so, and therefore the proceedings for its admission to probate was of no effect. (2) That the devisee under that will (Achsah Holloway) having died before that time, neither she nor her estate could take under the will.

As to the first contention, the petitioner was the ad-

ministrator of the estate of Achsah Holloway in the state of Michigan, and signed the petition for the probate of the will of Ira Holloway, which devised and bequeathed his property to her. There was no appeal from the action of the county court in receiving and acting upon the petition and the admission of the will to probate in this state. The county court had jurisdiction of the subject matter, and its judgment cannot be collaterally attacked. *Larson v. Union P. R. Co.*, 70 Neb. 261.

As to the second contention, it is shown that the will of Ira Holloway was duly admitted to probate in the state of Michigan before the decease of Achsah. It is certainly true, as claimed by defendant, that, in order that title and the right of possession may be shown in a claimant as devisee under a will, the will under which the title is asserted must be admitted to probate in order to its admissibility as evidence. It is also true that the legal title cannot vest in one deceased. It is conceded that, if a devisee die prior to the death of the testator, the estate, as a general rule, lapses, and, unless otherwise provided in the will, is intestate property. This, however, is subject to the provisions of section 5016, Ann. St 1911, but which is not important here. We have found no case holding that, if the beneficiary under a will dies subsequent to the death of a testator and before the will is probated, the devised property thereby lapses. If a will is executed in compliance with all the forms of law by one competent to make such will and the beneficiary survives the testator, the title to the devised property vests in the surviving devisee upon the death of the testator, but subject to the probating of the will, and, when so probated, it speaks as of the time of the death of the testator.

In *Babcock v. Collins*, 60 Minn. 73, it is held that where a foreign will was duly probated in the place of domicile of the testator, and the executor, under a power conferred in the will, sold the land in Minnesota, but without the probate of the will in that state, the sale would be sustained, if the will was probated subsequent

to the sale, and that the probating would relate back to the testator's death and perfect the title. Page, Wills, sec. 356. It is said by the same author (sec. 358) that a foreign will may be recorded (probated) even after litigation upon the title to realty has been taken to the supreme court, and, when so recorded, will date back to testator's death—citing *Wells, Fargo & Co. v. Walsh*, 88 Wis. 534; *Carpenter v. Denoon*, 29 Ohio St. 379.

In 1 Underhill, Wills, p. 437, sec. 324, it is said: "If the gift (devise) vests on the death of the testator, it will *not* lapse because of the death of the beneficiary before the time arrives for his enjoyment in possession." And in sec. 334 it is said: "The rule of lapse is not applicable to a case of the death of a legatee *after the death of the testator*. If the legacy has vested in the legatee, and he is to receive more than an estate for his life, the interest will not lapse upon his death, though that event may take place before the interest has become vested in possession," as a remainder in fee, etc.

In *Jersey v. Jersey*, 146 Mich. 660, it was held that, in the absence of provisions to the contrary in a will, a legacy does not lapse by death of the legatee after that of the testator before the probate of the will. See, also, *Traver v. Schell*, 20 N. Y. 89; *Price v. Watkins*, 1 Dall. (Pa.) *8; Schouler, Executors (3d ed.) sec. 467.

We therefore conclude that the title to the real estate of Ira Holloway in this state was vested in Achsah Holloway during her lifetime, subject to the probating of his will in this state, and that her decease before the will was probated here did not divest her estate of that title. In arriving at this conclusion, we have not overlooked section 5008, Ann. St. 1911, which provides: "No will shall be effectual to pass either real or personal estate, unless it shall have been duly proved and allowed in the probate court as provided in this chapter, or on appeal in the district court; and the probate of the will of real or personal estate as above mentioned shall be conclusive as to its due execution." It is evident from the provisions of

this section that the purpose of the legislature was to require the probating of the will before it would be "effectual" to pass the estate of record, but that it does not go to the extent of preventing the vesting of title, subject to such probate, for we held in *Walton v. Ambler*, 29 Neb. 626, that a failure to probate in Nebraska an Iowa will devising lands in this state would not preclude a devisee under the will from disposing of his interest in Nebraska lands, and that he would be bound thereby. It must be apparent that the probating in this state of a foreign-probated will is largely for the purpose of perpetuating the evidence of an already vested estate. There was no error in the admission in evidence of the record of the probating of the will.

As we have seen, defendant presented an equitable defense to the action, and in support of which evidence was introduced. By the fourth instruction given by the court the jury were told that their verdict should be "for the plaintiff on the first cause of action, unless defendant satisfies you by a preponderance of the evidence that he has been for a period of ten years in the open, notorious, exclusive and adverse possession of the premises, under a claim of ownership against all persons." This instruction excluded defendant's contention that, during the lifetime of Ira Holloway, he had purchased the land from Ira, had paid the price therefor by the cancelation of certain indebtedness held against Ira, and had taken and held possession under said purchase. The defendant was entitled to have this issue submitted to the jury, or, if plaintiff's contention that, being an equitable defense, it was for the court to decide is correct, the record should show affirmatively that the issue was passed upon by the court and a finding made of the facts as in any other case in equity, or that the question was submitted to the jury for an advisory verdict upon special findings. No such action is shown by the record.

The court having failed to submit the question to the jury, or to render any decision thereon, the cause will

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have to be remanded for further proceedings, which is done.

REVERSED.

NEBRASKA TRANSFER COMPANY, APPELLEE, v. CHICAGO,
BURLINGTON & QUINCY RAILROAD COMPANY, APPEL-
LANT.

FILED JANUARY 3, 1912. No. 16,581.

1. **Railroads: DEMURRAGE.** A railroad company engaged in interstate commerce may charge and collect demurrage or car service charges in accordance with its tariff schedules, rules and regulations, filed with and approved by the interstate commerce commission, on cars used in interstate shipments, where the consignee fails to unload and release them within 48 hours, free time, after notice of arrival and tender of the shipments to such consignee, or the one charged with the duty of unloading such cars.
2. ———: ———. The fact that neither the consignee nor the one charged with the duty of unloading is able to receive and unload the cars within 48 hours, free time, after notice of their arrival will not relieve the consignee of the obligation to pay such service charges.
3. **Trial: DIRECTING VERDICT.** Where the evidence on the trial in the district court is not conflicting, and reasonable minds cannot differ as to the conclusion to be derived therefrom, it is the duty of the court, when requested, to direct a verdict in accordance with such conclusion.

APPEAL from the district court for Douglas' county:
GEORGE A. DAY, JUDGE. *Reversed.*

James E. Kelby and Arthur R. Wells, for appellant.

T. W. Blackburn, contra.

BARNES, J.

Action to recover demurrage charges collected from the plaintiff on certain cars of sugar transported by the defendant railroad company from refineries located in states other than Nebraska, consigned to and received by

the Russell Brokerage Company at Omaha, in the months of October and November, 1907.

It appears that the plaintiff, the Nebraska Transfer Company, had the contract for unloading and storing the sugar, and paid the charges in question, which it claims were unlawfully exacted, and thereafter brought this action to recover the money so paid. The petition alleged the corporate capacity of the plaintiff and the defendant, and the facts upon which the recovery was sought were stated therein, as follows: "(5) That in the performance of its obligations to its customers, being the consignees of the said Chicago, Burlington & Quincy Railroad Company, it did at divers times receive from the Chicago, Burlington & Quincy Railroad cars loaded with freight to the number of 56, and did with all speed unload said 56 cars from the track and switches of said defendant corporation. But that the said defendant corporation, without any authority of law, as a condition of the delivery of the cars to this plaintiff, required this plaintiff to pay to the defendant the sum of \$409 in excess of the freight charges claimed by the defendant to be the just and proper charges, based upon the legal and established rate and classification under schedules published by said defendant; said defendant representing to said plaintiff that said sum of money, to wit, \$409, was due and owing from this plaintiff to the defendant as demurrage on said cars, the said defendant well knowing that no such sum, or any part thereof, was due from this plaintiff to the said defendant, and the said defendant, with the purpose of creating a claim or liability for said demurrage, failed and neglected to deliver to said plaintiff the cars as they were received from the consignor by the defendant, so that the plaintiff should have to unload not to exceed two cars per day, but, instead, forced upon this plaintiff from 7 to 12 cars per day and within such short intervals as to make it impossible for this plaintiff to unload all of said cars within 48 hours after their arrival in Omaha."

The defendant, by its answer, admitted the introductory paragraphs of the petition, and further admitted that the plaintiff was entitled to receive and have a refund of the demurrage charges assessed upon certain cars, which were described by numbers in the answer, amounting to \$12 in all, which sum the defendant offered and tendered to pay to the plaintiff before the action was begun, and offered to confess judgment in plaintiff's favor for that amount. The defendant's answer to paragraph 5 of the petition, which is quoted above, admitted that it did at divers times receive and transport over its lines and deliver to the plaintiff cars loaded with freight, and that it collected from the plaintiff demurrage or car service charges upon certain of said cars, which demurrage or car service charges were the legal and usual charges therefor, and were justly and lawfully due and owing to the defendant upon said cars from the consignees thereof, except the sum of \$12, and denied each and every other allegation contained in that paragraph, except those expressly admitted. Defendant also denied each and every of the allegations contained in the petition, other than those expressly admitted, and specially denied that it owed the plaintiff the sum of \$409, or any other sum, except the said sum of \$12. For further answer, the defendant challenged the jurisdiction of the court by suitable and proper allegations, which were, in substance, that it was a common carrier engaged in interstate commerce, and owned and was operating a line of railroad between points in the state of Nebraska and points in the states of Colorado, Iowa, Illinois, and other states, and alleged that as such common carrier it was subject to the act of congress approved February 4, 1887, entitled "An act to regulate commerce," and the acts amendatory thereof and supplemental thereto; that all of the shipments mentioned in the plaintiff's petition were interstate shipments, and were transported from points outside of the state of Nebraska to the city of Omaha, in the state of Nebraska; that the rates of charges and the

terms and conditions upon which the shipments were received and transported by the defendant, and the amount of the demurrage or car service charges that should be assessed thereon, and the terms and conditions upon which they were assessed, became due, were fixed and determined by the tariffs, rules and classifications of the defendant which had been published and filed with the interstate commerce commission at and before the time said shipments were received and transported; that the rights of common carriers and shippers in such cases were regulated and determined by the acts of congress relating to interstate commerce; that by said acts of congress the interstate commerce commission is vested with sole and exclusive jurisdiction to hear and determine the complaint made by the plaintiff in this action, and to award reparation therefor, in case it should appear that said charges were not legally assessed and collected, and this court and the courts of the state of Nebraska have no jurisdiction to hear and determine this controversy. Defendant prayed for a judgment against the plaintiff for costs.

Upon the issues thus joined, the cause was tried to a jury in the district court for Douglas county. At the close of all of the evidence, defendant moved the court to direct a verdict for the plaintiff for \$12, for which sum the defendant had theretofore offered to confess judgment. The motion was overruled, and the defendant excepted. The cause was then submitted to the jury, and a verdict for the plaintiff for \$170.24 was returned. Judgment was rendered thereon, and the defendant has appealed.

It is contended that the evidence does not sustain the judgment, and therefore the district court erred in overruling the defendant's motion to direct the verdict. The record discloses that on the trial the plaintiff abandoned the right of recovery on all but six cars of sugar, which it was contended defendant negligently placed and allowed to remain upon a certain storage track in order to

create a demurrage or service charge against the plaintiff.

The evidence on which plaintiff relied for a recovery and to support the judgment was given by its president, and is quoted in its brief as follows: "Q. With these exhibits before you, and any other papers that you may have to refresh your recollection, can you state when these cars were delivered to you, or notice given you that they were ready? A. Yes, sir. Q. You may state when. A. They were delivered on the team tracks of the Burlington on the 26th day of November, 1907. Q. How soon were they unloaded? A. They were unloaded the following day. They were either unloaded or reconsigned. They may not have been all unloaded the following day. Q. They were disposed of as far as you were concerned? A. Yes, sir. Q. Have you ever been refunded any part of this \$109? A. No, sir. Q. Calling your attention to the Rock Island car No. 30,695, have you any personal recollection with reference to that car, Mr. Magaret? A. Yes, sir. Q. What is it? A. That car was never unloaded here, but it was reconsigned. It was sent to Rochester, Minnesota. Q. Did you pay any demurrage on that car? A. The refineries paid \$31 on it, and it was charged back to our account and deducted at the time of settlement. Q. Did you pay that \$31? A. Yes, sir. Q. You may relate when you received notice that that car was available to you. A. We reconsigned that car immediately upon being advised that it had arrived. Q. State to the jury what you mean by reconsigned. A. Shipped it on. Billed it out and shipped it to Rochester, Minnesota. Q. Have you ever been refunded that \$31? A. No, sir.

As opposed to this testimony, it was shown by the defendant, without dispute, that notice of the arrival of each one of the cars in question, including car No. 30,695, was given by telephone to the Russell Brokerage Company, the consignee, on the day they arrived in Omaha. As to car No. 30,695, John Holmes, who was the chief

clerk in the defendant's freight office at Omaha, testified that on October 28, 1907, notice was given by him by telephone to the Russell Brokerage Company, the consignee, that the car had arrived, and this was followed at once by a postal card notice of that fact. It appears that plaintiff had a private track and warehouse situated upon the Union Pacific road, where it was engaged in unloading and storing cars of sugar for the consignee. Witness Holmes further testified that that car was at once delivered to the Union Pacific Railroad Company to be placed on plaintiff's private track; that it was returned to the defendant because the plaintiff's track was full of cars which they were then engaged in unloading, and it could not be placed thereon. The defendant then attempted to place the car on what is called the "team track," where the plaintiff was also engaged in unloading cars of sugar, but that track was full, and it was impossible to place the car there; that defendant was then compelled to place the car on its storage track; that when plaintiff was in condition to receive it, which was on the 28th day of November, 1907, it was then placed on the team track; that it was not unloaded at Omaha, but was then reconsigned and forwarded to Sioux City. This testimony was not disputed by any one, and its truthfulness is not challenged.

As to the other five cars, defendant's witnesses testified that notice was given both by telephone and by postal card to the brokerage company at the time each car arrived in Omaha; that they were then delivered to the Union Pacific company to be placed on plaintiff's private track for unloading; that the track was full of other cars which plaintiff was engaged at that time in unloading, and there was no room upon their private track for them; that thereafter the cars were immediately returned by the Union Pacific Railroad Company to the defendant; that the defendant at once attempted to place them upon its team track, where the plaintiff was also engaged in unloading and storing car-loads of sugar for the brok-

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erage company; that the team track was full, and the cars could not be placed upon it; that thereupon they placed them with car No. 30,695 upon the storage track, and they remained there until the plaintiff was ready to receive and unload them, when they were promptly placed upon the team track. This testimony is also undisputed, and its truthfulness is in no manner challenged.

The record further discloses that Mr. Magaret, the president of the plaintiff company, upon his cross-examination testified as follows: "Q. The way you handled this sugar business ordinarily would be to have the cars delivered on your private side-track at your warehouse, would it not? A. We had some delivered there and some delivered on the team tracks. Q. Until your private side-track was filled with cars and no more could be sent there, did you undertake to unload any cars on the team track? A. It was not a matter of our tracks being full at the warehouse, it was a matter of not having room at the warehouse, so we rented another warehouse that was not on the tracks, and because of the team tracks being near by that warehouse we had the cars set there. Q. During all this period of which you have been testifying, while this demurrage was accruing, did you have your full force working unloading cars? A. Yes, sir. Q. Were there enough cars of sugar on the team tracks all the time to keep your forces all busy? A. Well, I do not know what you mean by all the time. Q. I do not mean Sundays or nights, but I mean during the working hours of week days. A. During what period? Q. Well, this period you have been complaining about, when there were so many cars there, from the 25th to the 28th of October, and immediately before and after that. A. Yes; I think there were some cars on the team tracks there all the time. Q. For you to unload? A. Yes, sir. Q. Now, you were not using those team tracks alone? Other consignees were unloading there all the time, and had cars there for unloading? A. I presume so. Q. They were a part of the public team tracks of the Burlington company

at Omaha for the general public use, were they not? A. I think so, I am not sure that they were all, but— Q. You did not claim any right to use those tracks other than any other person having business with the company had of the same kind? A. No. Q. Now, referring to the five cars which are covered by the receipts, exhibits 1, 2, 3, 4 and 5, I think you paid \$109 on them. I call your attention to the fact that all of these bills are made out to the Russell Brokerage Company, are they not? A. Yes, sir. Q. And the bills in each case were made out to that company because that was the consignee of the cars? A. I presume so. Q. And you are unable to say from your knowledge that notice was or was not given to the Russell Brokerage Company of the time of arrival of those cars, at a time which would start the car service charges to running, or at the times shown by these bills? A. I have no way of knowing what notice was given the Russell Brokerage Company. * * * Q. Do you know that at the time these cars arrived, or shortly before, the Union Pacific had served notice upon the Burlington that it would receive no more cars for your private track, for the reason that it was full? A. I do not know about that. Q. Don't you know that was a fact? A. The tracks were full at the warehouse some part of the time, but the Burlington had notice to deliver any cars that were refused by the Union Pacific to their team tracks, and that they would be unloaded at the team tracks. Q. Did you ever at any time make any request upon Mr. Holmes, or any one connected with the local freight office, to have any cars set upon the team tracks, when that request was not complied with within a reasonable time? A. I do not know about that. * * * Q. Were you, during this same time, receiving cars of sugar *via* other railroad lines to be unloaded? A. Yes, sir. Q. And that took part of your forces? A. We had an extra force of men at this warehouse up here, we hired considerable extra help, both teams and men." Herbert C. Kohn, who had charge of the Russell Brokerage Company's business at that time, testified that he had made no effort to find out

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whether or not his company received notice of the arrival of car No. 30,695, which contained a shipment of sugar from Port Costa, and was reconsigned on the 28th day of November, and sent on to Sioux City.

It thus appears that the defendant's evidence in relation to the arrival, the notice of the arrival, and the unloading of the six cars in question was in no way disputed. Defendant also introduced in evidence its published schedules of tariff rates, rules and regulations adopted by the Western Car Service Association, of which it was a member, and approved by the interstate commerce commission, from which it appears that the defendant was required to charge and collect from shippers or consignees the demurrage or car service charges in question, and, had the defendant neglected to collect such charges, it would have been subject to prosecution for granting rebates to, or making discriminations in favor of, the consignee in this case.

Finally, it should be observed that the plaintiff alleged, in substance, and the evidence shows, that it could only unload from two to three cars a day; that all of the time for which the service charges were made there were from three to fifteen cars of sugar ready to be unloaded upon the team tacks. It therefore follows that to hold defendant's right to collect those charges dependent upon its having placed the cars in question upon the team track before November 28, 1907, would, in effect, require the doing of an impossible, useless, and vain thing.

From the foregoing it seems clear that the evidence was insufficient to sustain the judgment complained of, and the trial court erred in refusing to direct a verdict as requested by the defendant at the close of all of the testimony. Having arrived at this conclusion, it is unnecessary for us to consider or determine the jurisdictional question.

For the foregoing reasons, the judgment of the district court is reversed and the cause is remanded for further proceedings in accordance with this opinion.

REVERSED.

SIBLEY & DAVIS, APPELLEE, v. WILLIAM RODGERS,
APPELLANT.

FILED JANUARY 3, 1912. No. 16,589.

1. Appeal: CONFLICTING EVIDENCE: LIMITATIONS. Where the statute of limitations is pleaded as a defense to an action on a promissory note, and that question is submitted to the jury upon conflicting evidence, under proper instructions, a court of review will not disturb the verdict.
2. ———: NOTES: CONSIDERATION: EVIDENCE. Where a defendant pleads a total failure of consideration as a defense to an action on a promissory note, and his evidence at most tends to prove only a partial failure of consideration, it is not error to refuse to submit that defense to the jury.

APPEAL from the district court for Antelope county:
ANSON A. WELCH, JUDGE. *Affirmed.*

J. B. Smith, for appellant.

F. L. Putney and O. A. Williams, contra.

BARNES, J.

Action on a promissory note, which was dated December 31, 1902, and due one year from the date thereof. The petition was in the usual form, with an additional allegation that the defendant had paid \$5 on the note, which was indorsed thereon, within five years next before the commencement of the action. The defendant, by his answer, admitted the execution of the note, denied that any payment had been made thereon, and alleged that the note sued on was given for the purchase of a wagon, which was warranted in every respect by the plaintiff to the defendant "as being a good wagon, both as to material and workmanship; but said wagon proved to be worthless for the purpose for which it was intended, and a source of expense to the defendant, and the plaintiff neglected and refused to repair or fix the same, or to replace it by a new wagon, as he had agreed to do, in case

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the defendant found that the said wagon was faulty in any respect, although often requested by the defendant so to do, and therefore this defendant has received no valuable consideration whatever, save and except the said worthless wagon, and that the plaintiff has wholly neglected and refused to comply with said conditions of his warranty of said wagon." Plaintiff, by the reply, admitted that the note was given for the purchase price of a wagon, alleged that the wagon was warranted as to material and workmanship for one year only, and denied all of the other allegations of the answer. The cause was tried in the district court for Antelope county upon the issues thus presented. The plaintiff had the verdict and judgment, and the defendant has appealed.

Contention is made that the verdict is not sustained by the evidence, and that the court erred in not submitting the question of the failure of consideration to the jury. From a careful examination of the record, it appears that counsel for the defendant, in framing his answer, adopted the theory of his client that there was a total failure of consideration for the note in suit, and relied upon that fact as one of his defenses. A reading of the bill of exceptions discloses that the defendant's evidence did not support that theory. The testimony, when construed most favorably to the defendant's contentions, tends to show that the boxing of one wheel of the wagon was found to be cracked some few months after defendant purchased it. But his own witnesses testified that he used the wagon in the ordinary way; that at one time he took a load of about 50 bushels of shelled corn to the market with it, and continued to use it for general purposes until about the 1st of April, 1907, when he had it repaired by a wheelwright, who testified that he put in a new axletree, part of the skein and boxing, and reset the spokes to the wheel, and set the tires; that, notwithstanding more than four years had elapsed after defendant purchased the wagon, the wheelwright found no other defects in it. Defendant made no claim for cost

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of repairs, and it appears that the plaintiff offered to allow him a credit of \$7 therefor if he would pay the balance of the note. This he refused to do.

With the evidence in the condition above indicated, the district court submitted the question of the statute of limitations to the jury under proper instructions. This was the only defense upon which there was any conflict in the evidence, and upon this question the jury found for the plaintiff.

It seems clear from the whole record that the defendant had a fair trial, and, being unable to show a failure of consideration, which was one of his principal defenses, judgment was properly rendered against him.

Finding no error in the record, the judgment of the district court is

AFFIRMED.

ARMSTRONG CLOTHING COMPANY, APPELLEE, v. JAMES A. BOGGS, APPELLANT.

FILED JANUARY 3, 1912. No. 16,591.

1. **Parent and Child: LIABILITY OF PARENT.** Ordinarily a father is not liable to pay for clothing purchased by his minor son. But where such purchases are made with the father's knowledge and consent, and his conduct is such that the seller may reasonably infer that the father authorized them, he may be held liable therefor.
2. **Evidence: BOOKS OF ACCOUNT: ADMISSIBILITY.** An account kept by a tradesman in a book called a loose-leaf ledger, shown to be his book of original entries, and which contains many successive charges against the defendant and other persons, made in the usual course of business and at the time the transactions occurred, upon being properly verified as provided by section 346 of the code, may be admitted in evidence as a book account.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. Affirmed.

W. C. Frampton, for appellant.

George A. Adams, contra.

BARNES, J.

Action to recover a balance on account for clothing sold and delivered to defendant and his minor son. The petition was the ordinary declaration to recover a balance due on an assigned account. The defendant for his answer denied that he had purchased any goods whatever from the plaintiff that were not paid for, or that he is indebted to the plaintiff for any goods sold and delivered to him whatever. Defendant admitted that his son, Glen Boggs, was a minor, and denied that his son purchased any goods from the plaintiff or its assignors with his knowledge or consent, and denied each and every allegation of the petition not admitted by the answer. Upon those issues the cause was tried to a jury. The plaintiff had the verdict and judgment, and the defendant has appealed.

It appears that the defendant had an open account with the B. L. Paine Clothing Company of Lincoln, Nebraska, for goods sold and delivered to him and other members of his family, on which from time to time he made partial payments. The B. L. Paine Clothing Company sold and assigned the account to its successor in business, the Adams, Farquhar, O'Neill Company, doing business under the name of the Sterling Clothing Company; and the last named company sold, assigned and delivered the account to the plaintiff. It further appears that the defendant and his minor sons purchased clothing on credit from time to time from the firm above named, which was charged to his account in what is called a loose leaf ledger, which was the book of original entries, and the only one in which the accounts with defendant and other purchasers were kept; that the defendant made partial payments on the account from time to time until the balance due thereon was reduced to \$44.85; that there-

after he refused to make any further payments, and thereupon this suit was brought.

Appellant contends that the evidence was insufficient to support the verdict, and that the motion by which he requested the district court to instruct the jury to return a verdict in his favor should have been sustained, for the reason that a parent is not liable for goods sold to a minor, and that the defendant was under no legal obligation to pay for them. This contention, as an abstract proposition of law, is probably sound, but to this general rule there are certain exceptions, one of which is that if the father has knowledge that goods are being purchased, and he suffers them to be purchased, retained and used by his minor son under such circumstances and in such a manner as to give the seller the right to infer that he would be responsible and would pay for them, then in such a case he is liable therefor.

In the case at bar the evidence discloses without dispute that the plaintiff and the members of his family on the 12th day of November, 1906, began to purchase clothing of the B. L. Paine Clothing Company, and thereafter until the 27th day of December, 1907, purchased such articles on credit from time to time; that defendant had knowledge of said purchases, made no objection thereto until some time thereafter, and now makes no objection to any particular item of the account; that he made payments on the account at different times in different sums, amounting in all to \$115.55, and there was a balance due upon the account of \$44.85, with interest thereon, at the time this action was commenced. It is true that the defendant testified that at one time he told the manager of the company that he would not be responsible for the debts of his minor son; but he was unable to say when this conversation occurred. While, on the other hand, the plaintiff produced evidence tending to show that the defendant had at different times promised to pay the account. Upon this evidence the trial court submitted the question of the defendant's liability to the jury, under

proper instructions, and that question was resolved against him. Therefore, on this branch of the case, it is sufficient to say that, if the evidence is to be believed, the verdict of the jury should be sustained.

Defendant also strenuously contends that the district court erred in receiving the assigned book account in evidence over his objections; and it is argued that it was not admissible as a book account under the provisions of section 346 of the code. It appears, however, that before this evidence was received it was shown by competent testimony that the loose leaf ledger in which the items of account in question were entered was the original and only book of accounts kept by the plaintiff and his assignors; that it contained many successive charges by the B. L. Paine Clothing Company and its successors against the defendant, entered from time to time in the ordinary course of business. It was shown that the dealings were continuous, not only with the defendant, but with other persons, and such dealings were entered in the same book; that the entries were made at the time the transactions occurred. Finally, the account was verified by plaintiff's head salesman, who had held that position with the plaintiff and its predecessor and assignors for many years, including the time when the goods in question were purchased. This witness also testified that he saw many of the charges made, that they were all in the handwriting of the bookkeeper, and were correct. It was further shown that at the time of the trial the residence of the bookkeeper was not known, and the plaintiff was unable to procure her testimony. It therefore seems clear that the testimony relating to the book account, the manner in which it was kept, and the verification thereof, was sufficient to make it competent evidence in this case.

From a careful examination of the record and bill of exceptions, it appears that the cause was fairly tried; that it was submitted to the jury under proper instructions; and, finding no reversible error in the record, the judgment of the district court is

AFFIRMED.

HARVEY M. DUVAL ET AL., APPELLANTS, v. JOSEPH JOHNSON ET AL., APPELLEES.

FILED JANUARY 3, 1912. No. 16,613.

1. **Judgment: VALIDITY: CONSTRUCTIVE SERVICE.** Where, in an action to foreclose a tax lien brought against a nonresident, neither the record nor the files in the case furnish proof that a notice for constructive service was ever published, a judgment in such proceedings is subject to collateral attack.
2. ———: ———: **RECITALS IN JUDGMENT.** A recital in the judgment that "the court finds that due and legal notice of the filing and pendency of this action was given the defendants" will not supply the lack of the facts necessary to confer jurisdiction.

APPEAL from the district court for Keya Paha county:
JAMES J. HARRINGTON, JUDGE. *Reversed.*

Harvey M. Duval, Ross Amspoker and J. A. Douglas,
for appellants.

Lear & Lear, contra.

LEITON, J.

This action was brought to quiet the title to certain real estate. Plaintiffs allege that they are the owners, and that the defendants are in possession of the premises claiming by virtue of a sheriff's deed issued in certain void proceedings to foreclose a tax lien on the property. The defendants answered by general denial and a plea of title under the decree of foreclosure, and prayed affirmative relief. The court found that Lyman G. Blair, plaintiffs' grantor, was divested of his title by the foreclosure, and that the quitclaim deed to the plaintiffs from him constituted a cloud upon the defendants' title. The judgment dismissed the plaintiffs' petition and quieted the title in the defendants.

The only point relied upon by plaintiffs for reversal is that in the tax foreclosure suit the court was without

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jurisdiction, for the reason that the record therein does not show that any service of summons was had or service by publication made upon Blair. At the trial plaintiffs offered in evidence a quitclaim deed from Blair and rested. The defendants called C. A. Ripley, who was clerk of the district court in October, 1901. He identified the appearance docket kept at that time, and testified that William Skinner, then the owner and publisher of the Springfield Herald, signed a receipt, which was written on the page of the docket under the title of the foreclosure case, for "printer's fee in this case, \$10." The witness testified that this was in payment of the publication of notice by constructive service to nonresidents, and that the custom was that the affidavit of service "invariably would be filed before receiving his fees." The same docket also shows a similar receipt dated November 13, 1901, in the same case, "fee for sale notice, \$9." No notice to defendants or proof of its publication appears in the files or in the record. It is shown that Skinner had the contract for printing all legal notices in connection with tax foreclosures by the county. The appearance docket shows the following papers were filed in the case: Petition, affidavit, *lis pendens*, decree, copy of appraisal, return to appraisal, order of sale, proof of publication of sale, confirmation. The clerk further testifies that it was his custom to note upon the appearance docket the filing of each instrument at the time it was filed; that there is no mention on the appearance docket of the filing of any proof of publication of notice to nonresident defendants; that in no other case are papers in the files which are not noted in the appearance docket; that he has no personal recollection as to whether any such proof was filed in that case; that there were a large number of tax foreclosure cases at this time; that Mr. Skinner would bring the notices, of which there were usually from 10 to 20, and he entered them in the appearance docket and put them in the files of the cases; and that it was his practice to examine the files and see if the affidavit of publication

was properly filed or delivered before he paid the printer's fees. No complete record seems to have been made. The evidence does not show that a search was made either for a newspaper containing the notice or for the proof of service, so that it may be questioned whether under the rule in *Murphy v. Lyons*, 19 Neb. 689, any of this testimony is competent; but it is deemed proper to set it forth. Where titles depend on court proceedings, it seems inexcusable that no complete record is made as the statute requires.

The decree recites: "The court finds that due and legal notice of the filing and pendency of this action was given the defendants as required by law." The vital question is whether this finding may be impeached by the fact that the record fails to show that any notice was ever published. This court has uniformly held that statutes relating to constructive service will be strictly construed, and that in order to sustain the jurisdiction of a court based on such service the record must affirmatively show that the statute has been complied with. *Murphy v. Lyons*, *supra*; *Albers v. Kozeluh*, 68 Neb. 522; *Boden v. Mier*, 71 Neb. 191; *Stull v. Masionka*, 74 Neb. 322. The fact that a formal recital that service has been had upon the defendants is in the decree does not change this principle. This doctrine has been severely criticised by text-writers. *Works, Courts and Their Jurisdiction*, 284, 295; *Van Fleet, Collateral Attack*, 479, 480. The weight of authority in other states seems to support a contrary view, but the rule of strict construction which has been followed by this court forbids allowing such a formal recital to supply a total failure of the record to show the publication of any notice. These views are not without support by other courts. 1 *Black, Judgments* (2d ed.) sec. 281; *McMinn v. Whelan*, 27 Cal. 300, 314; *Shehan v. Stuart*, 117 Ia. 207; *Buck v. Hawley & Hoops*, 129 Ia. 406; *Cissell v. Pulaski County*, 10 Fed. 891; *Galpin v. Page*, 18 Wall. (U. S.) 350; *Settlemier v. Sullivan*, 97 U. S. 444; *Daniels v. Patterson*, 3 N. Y. 47; *D'Autremont*

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v. Anderson Iron Co., 104 Minn. 165. In a number of recent cases, where the service was fair on its face, but the fact was that the alleged nonresident lived in this state, this court, contrary to the general rule in other states, held that the judgment was void and subject to collateral attack. *Humphrey v. Hays*, 85 Neb. 239; *Herman v. Barth*, 85 Neb. 722; *Clarence v. Cunningham*, 86 Neb. 434. Having adhered to the rule of strict construction for so many years, we are content to follow the beaten track in this jurisdiction.

It seems obvious that the jurisdiction of the court cannot depend upon the mere manner of proof of publication. The essential inquiry is whether or not publication was ever made in accordance with the statute. If a copy of a notice appeared, there might be room for the presumption that the court had proof before it that the notice had been published for the necessary time when it made the finding. It is probable that the court might permit such proof to be supplied even after a decree and sale thereunder, as was done in the case of *Britton v. Larson*, 23 Neb. 806. See, also, *Works, Courts and Their Jurisdiction*, 284. But we are of opinion that it would be giving too much force to a presumption, and not enough weight to the constitutional provision that property shall not be taken without due process of law, if we held in a case where no notice appears to have been published, and where there is testimony of a negative character tending to show that if a notice had in fact been published and proof made the affidavit would have been filed with the clerk and entered upon the appearance docket, that the presumption as to the regularity of judgment should supply the place of the absent notice. It is possible that upon a retrial some additional proof may be furnished of the fact of publication. Since the record fails to show jurisdiction to render the decree under which the defendants base their title, the judgment of the district court must be reversed.

It is also urged that the plaintiffs failed to establish

the allegations of their petition by not proving a connected title from the United States to their grantor. There might have been something in this contention if, made at the proper time; but, when plaintiffs rested, defendants proceeded with their proof, and it became clearly apparent that both parties claimed to derive their title from a common source. This being the theory on which the case was tried in the district court, it must be so tried here.

The judgment of the district court is reversed and remanded for further proceedings.

REVERSED.

ROOT and ROSE, JJ., dissent.

NEMAHA VALLEY DRAINAGE DISTRICT, APPELLEE, V.
THOMAS B. STOCKER, APPELLANT.

FILED JANUARY 3, 1912. No. 16,625.

1. **Drains: Assessments.** In levying an assessment by a drainage district, that portion of land taken for the right of way of the ditch should not be assessed to the landowner from whose premises it is taken.
2. ———: ———. In such assessments exact nicety of apportionment is impossible. If the result of the improvement will be to specially benefit each tract or subdivision as a whole, it is immaterial whether within its limits there are portions which are not susceptible of cultivation, and the value of which, if taken by themselves and disconnected from the remainder of the tract, would not be enhanced.

APPEAL from the district court for Nemaha county:
JOHN B. RAPER, JUDGE. *Reversed.*

E. B. Quackenbush, T. R. P. Stocker and Fred G. Hawxby, for appellant.

Kelligar & Ferneau, contra.

LETTON, J.

From an assessment upon the appellant's land to pay the cost of the improvement in Nemaha Valley Drainage District No. 2, of Nemaha county, this appeal was taken. Many of the errors assigned are disposed of by the opinion in *Nemaha Valley Drainage District v. Marconnit*, p. 514, *post*, and will not be again considered.

The channel of the main drainage ditch, as planned, crosses the appellant's land diagonally. A proposed lateral drainage ditch also crosses his land in much the same direction. Appellant filed specific objections before the board of supervisors to the engineer's report and to the proposed assessment. The percentage of assessment upon one tract was reduced from 100 to 50 per cent., but in other respects the report of the engineer was confirmed. The district court affirmed the action of the board.

The appellant contends that he cannot be assessed for that portion of his land included in the right of way taken by the drainage district for the purposes of the improvement. The evidence shows that the land proposed to be taken by the district according to the plan of the engineer amounts to 27.85 acres. It is clear that, if the land is taken from appellant by the construction of the ditch, he ought not to be compelled to pay for benefits to property of which he is deprived by the very act of construction. We think this was erroneous, and the appellant is entitled to be relieved from the assessment to the extent that it is based upon land actually appropriated by the district.

Another objection made by appellant is that he is wrongfully assessed for that portion of his land which is occupied by the old channel of the Nemaha river, for the reason that this land cannot be benefited by the improvement. The plat shows that the Nemaha river is a winding stream in its course along the boundary of a part of appellant's land. The evidence does not show whether

the several tracts, according to the quantities of land marked on the plat and assessed to appellant, extend to the thread of the stream, but, even if they do, it is clear that it would be almost impracticable to separate the land covered by the tortuous course of the channel from the remainder of each of the respective tracts for the purpose of assessment. The benefits must be assessed as nearly as may be just under all the circumstances surrounding each tract. Exact nicety of apportionment as to each square yard or square rod is impossible. If the result of the improvement will be to specially benefit each tract or subdivision as a whole it is immaterial whether within its limits there are portions which are not susceptible of cultivation and the value of which if taken by themselves and disconnected from the remainder of the tract would not be enhanced.

With respect to the contention that the board assessed the appellant for benefits to a portion of his land included in the public highway, the record shows that two acres were deducted for the land occupied by the road to the south of his land. There has been no evidence called to our attention showing that the land occupied by the "Half-breed road" was included in the assessment. The plat shows the boundary line of his land to be the west line of the Half-breed Indian reservation, and in the absence of proof to the contrary we must presume that the land occupied by the road is not within the tracts assessed.

The appellant asked that the corporation furnish and maintain permanently a bridge over the new channel or ditch, or, in lieu thereof, pay him \$5,000 damages for the cutting of his land by the new channel. He also complained of other damages caused by the main and lateral ditches cutting the land into small pieces so as to render portions inaccessible and creating waste, trouble and delay in farming. In the opinion in *Nemaha Valley Drainage District v. Marconnit*, p. 514, *post*, the rule with regard to the ascertainment of damages to land taken or damaged

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by the construction of such an improvement as this is stated, and we think that opinion covers and disposes of these contentions. The appellant is not deprived of his right to such damages by the failure to be awarded them in these proceedings.

The other points covered by this appeal we believe to be settled by the opinions in *Nemaha Valley Drainage District v. Marconnit*, p. 514, *post*, *Nemaha Valley Drainage District v. Skeen*, p. 510, *post*, and *Nemaha Valley Drainage District v. Higgins*, p. 513, *post*, and they will not be further considered.

The judgment of the district court is

REVERSED.

FAWCETT, J., not sitting.

NEMAHA VALLEY DRAINAGE DISTRICT, APPELLEE, v. BEN-
JAMIN T. SKEEN, APPELLANT.

FILED JANUARY 3, 1912. No. 16,626.

Drains: ASSESSMENTS. Upon an examination of the evidence, it is held to sustain the judgment of the district court.

APPEAL from the district court for Nemaha county:
JOHN B. RAPER, JUDGE. *Affirmed.*

E. B. Quackenbush and *Fred G. Hawxby*, for appellant.

Kelligar & Ferneau, contra.

LETTON, J.

The same general complaints are made as in the case of *Nemaha Valley Drainage District v. Marconnit*, p. 514, *post*, and these points will not be further considered. The appellant, however, urges several objections peculiar to his own case which it is necessary to examine.

At the time the district was originally organized 52½ acres of his land were included therein, and the remainder was afterwards brought in by the district court. At the hearing a number of specific objections were made by the appellants, which may be summarized, as follows: That very little of the original 52½ acres included in the district is subject to overflow; that part of it is timber land and would be benefited rather than injured by a flood; that the construction of the improvement would cast an additional volume of water upon the remainder of the tract; that the outlet for the waters of Swartz creek, a tributary stream, would be dammed by the improvement and cast upon his lands; that his lands are only flooded by the back water in the Nemaha, occasioned when the Missouri river is in flood. He denies that his lands will receive any benefit from the improvement, and asks that the assessment on the 52½ acres be reduced from 100 per cent., as fixed by the engineer, to 25 per cent., and for damages in the sum of \$500 for injury to the remainder of the land. On appeal to the district court, his objections and protests were considered and the percentage of the assessment was substantially reduced on a part of his land.

The testimony of the engineer and several witnesses residing in the neighborhood and familiar with the land shows that much of appellant's land included within the drainage district is subject to overflow. In regard to the contention that this land was only flooded by back water caused by high water in the Missouri river, the engineer's testimony is that the difference between the elevation at the confluence of the Little Nemaha with the Missouri river and the elevation at a point on appellant's land which is about the average elevation thereon is 7.94 feet; that if the Missouri river were higher than the Nemaha there would be an upstream current flowing on the surface from the Missouri river, but that while this was flowing the current beneath would also be flowing into the Missouri much the same as at ordinary stages. From

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these facts he draws the conclusion that with this difference in level the overflow on the appellant's land could not be caused solely by back water, as he claims. Appellant testifies that he has made a system of drains upon his land, and has straightened the channel of Swartz creek so that the water is more rapidly discharged, and has constructed dikes which protect his land from overflow; and that the construction of the proposed improvement would conduct the flood waters down the river valley so rapidly that the inevitable result would be that the grade of a railroad which extends across the valley below his land would hold back the water and cause it to overflow his property to a greater extent than before. He testifies further that his land would be worth no more after the improvement than before and that its result would be to cause him actual damage. A number of witnesses testified substantially in corroboration as to the results of high water in the Missouri river upon these lands, as well as to the condition of appellant's land with respect to the overflow. On the other hand, the testimony on behalf of the drainage district seems to establish that that portion of appellant's land which is assessed is subject at least in part to overflow, and that the assessment as finally modified by the district court is not unfair.

Considering all the evidence, we are not convinced that the tracts involved will not be specially benefited to the amount of the assessment. The question is a closer one in this case than in the *Marconnit* and *Higgins* cases, pp. 514, 513, *post*, but we are satisfied the evidence sustains the judgment of the district court, which is, therefore,

AFFIRMED.

FAWCETT, J., not sitting.

NEMAHA VALLEY DRAINAGE DISTRICT, APPELLEE, v. H. F.
HIGGINS, APPELLANT.

FILED JANUARY 3, 1912. No. 16,627.

Drains: Assessments. In order to sustain an assessment made by a drainage board under chapter 161, laws 1905, it is not essential that the levy be confined to that portion of a tract of land liable to be actually covered with water in times of flood. If the improvement adds to the value of the whole of the owner's land or to an entire government subdivision the assessment may be made accordingly.

APPEAL from the district court for Nemaha county:
JOHN B. RAPEB, JUDGE. *Affirmed.*

E. B. Quackenbush and Fred G. Hawaby, for appellant.

Kelligar & Ferneau, contra.

LETTON, J.

The appellant is the owner of two tracts of land, one consisting of 40 acres and the other of 10 acres in Drainage District No. 2, in Nemaha county. He appeals from a judgment confirming an assessment on the same. Appellant makes the same general objections to the validity of the statute and the jurisdiction of the court as are made in the case of *Nemaha Valley Drainage District v. Marconnit*, p. 514, *post*, and it is unnecessary to again treat of them. In addition, he complains that the evidence does not justify the assessment of his land as made.

The testimony shows that both of these tracts were in part subject to overflow, but that each tract was not liable to be entirely flooded. Among other things, it is insisted that, because each entire tract is not subject to be covered with water, the assessment is not confined to the land benefited, is unjust, and cannot be sustained. It is clearly impossible to make an assessment according to the varying contour lines of the high water mark. The only practicable method is to assess the land benefited as

nearly as may be according to the actual boundaries of the land of each proprietor or with reference to government subdivisions. *Moore, Ex'r, v. People*, 106 Ill. 376. Even though a portion of each small tract may not be overflowed, it is fair to conclude that the flooding of a part diminished the value of the whole, and that benefitting an irregular portion in a 40-acre tract added to the value of the whole subdivision.

We are of opinion that the evidence sustains the judgment of the district court, which is

AFFIRMED.

FAWCETT, J., not sitting.

**NEMAHA VALLEY DRAINAGE DISTRICT, APPELLEE, v.
GEORGE F. MARCONNIT, APPELLANT.**

FILED JANUARY 3, 1912. No. 16,628.

1. **Drains: ASSESSMENTS: APPEAL.** It is sufficient to confer jurisdiction on the district court on appeal from a hearing upon objections to the assessment of lands to pay the cost of the improvement by the board of supervisors of a drainage district organized under the provisions of chapter 161, laws 1905, if the "secretary shall make and file a transcript of said hearing, together with all the papers relating thereto, with the clerk of the district court in which said matter has been appealed."
2. **Constitutional Law: DRAINAGE ACT: CLAIMS FOR DAMAGES.** The amendment made in 1909 of chapter 161, laws 1905, commonly known as the "Peabody Act," by which certain provisions providing for the filing of claims for damages and a hearing thereon before the board of supervisors in connection with the assessment were omitted from the amended act, held not to render the amended act unconstitutional, as being in violation of section 21, art. I of the constitution.
3. **Drains: ESTABLISHMENT: ASCERTAINMENT OF DAMAGES.** In the taking or damaging of private property by a drainage district corporation in carrying out the purposes of its organization, the same principles apply as to the ascertainment of damages as in the exercise of the right of eminent domain for the location of

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a highway, the construction of a railroad, or like instances where private property is taken or damaged for public use.

4. ———: ———: ———: ACTION AT LAW. The fact that a special proceeding is not provided for in the act in question for the ascertainment of damages to land not actually taken does not interfere with the right of a landowner to maintain an action at law to recover his actual pecuniary loss, if any.
5. ———: DRAINAGE DISTRICT CORPORATIONS. A drainage district corporation founded under chapter 161, laws 1905, by the terms of section 37 is a body politic and corporate, and may sue and be sued.
6. ———: DRAINAGE DISTRICTS: BOARD OF SUPERVISORS: JURISDICTION. Where an engineer was appointed to make a survey, estimate and report for a drainage district, under the act of 1905, a topographical survey and maps and profiles made in substantial conformity with the provisions of the act as it then stood, which were filed in January, 1909, were sufficient to vest the board of supervisors with jurisdiction.
7. ———: ———: PETITIONERS: POWER TO LIMIT CORPORATION. A person signing articles of incorporation for the formation of a drainage district under chapter 161, laws 1905, cannot limit the powers of the corporation as to the manner in which the territory within the district shall be drained by expressions in the petition filed for the purpose of the formation of the district.
8. ———: ASSESSMENT OF BENEFITS. Where a general plan or scheme adopted for a drainage district consisting of over 20,000 acres of land in a river valley provides, as a part of the plan, for the straightening and cleaning out of the channel of the river and the excavation of certain lateral ditches, in order to more quickly dispose of water from overflow and that arising from surface waters flowing into the district from high lands adjoining, and the evidence shows that the lateral ditches are necessary to the complete carrying out of the plan or scheme, the mere fact that some of these laterals are not so situated as to confer a direct and immediate benefit on a landowner within the district cannot operate to relieve his land of its fair proportion of the common burden.
9. ———: ———. The fact that an exact measurement of the benefits which may accrue to lands within a drainage district cannot be made with mathematical accuracy until after the completion of the scheme does not render the damages so speculative and conjectural in their nature as to be impossible of ascertainment before the improvement is made.

10. Evidence examined, and held sufficient to sustain the findings and judgment of the district court.

APPEAL from the district court for Nemaha county:
JOHN B. RAPEL, JUDGE. *Affirmed.*

E. B. Quackenbush and Fred G. Hawaby, for appellant.

Kelligar & Ferneau, contra.

LEITON, J.

In June, 1906, proceedings were begun in Nemaha county for the purpose of organizing a drainage district under the provisions of chapter 161, laws 1905, commonly known as the "Peabody Act," which resulted in the creation of a drainage district corporation. An engineer was employed by the board of supervisors, who made a survey and prepared and filed maps and plans with a report ascertaining and apportioning the benefits to each tract of land within the district. The board of supervisors then notified the owners of property affected of the time and place when and where objections to the report of the engineer and to the proposed assessment of benefits and to all other matters and things connected with the assessment could be heard. Much the greater number of property owners made no complaint, but a number of objections were filed, and separate hearings were granted to each objector. The board of supervisors in each case took testimony both on behalf of the objectors to the assessment and in support of the engineer's report, and personally inspected each tract or parcel of land as to which the proposed assessment was contested. A number of changes were made by the board at the respective hearings, and such changes, when made, reduced the amount of the assessment or operated to exclude from the district certain tracts included by the engineer, and the assessment of which was complained of. An appeal was taken from the board of supervisors to the district court, where hearings were had and decrees rendered, and from

such a decree Mr. Marconnit, a landowner and objector, has appealed to this court.

1. The transcript filed in the district court recited the objections filed by each appellant to the report of the engineer, the proceedings at the hearing before the board, and the final decision of the board on the matter. The jurisdiction of the district court was challenged on the ground that no sufficient transcript had been filed; the argument being that a complete record of all proceedings in the organization of the district, including the report of the engineer, should have been filed on appeal. We think this was unnecessary to confer jurisdiction. The statute. (laws 1909, ch. 147, sec. 17) requires that, after an appeal bond is filed, the "secretary shall make and file a transcript of said hearing, together with all the papers relating thereto, with the clerk of the district court, in which said matter has been appealed. Upon the filing of said transcript and bond the said district court shall have jurisdiction of said cause, and the same shall be docketed and filed as in appeals in other civil actions to said court, and said court shall hear and determine all such objections in a summary manner as a case in equity, and shall increase or reduce the amount of benefit on any tract where the same may be required in order to make the apportionment equitable. All objections that may be filed shall be heard and determined by said court as one proceeding and only one transcript of the final order of the board of supervisors fixing the apportionments or benefits shall be required." A complete transcript showing the organization of the corporation and the final order of the board fixing the apportionment appears in the record, being offered in evidence in the district court. We are of opinion that the court acquired jurisdiction by the filing of a transcript of the proceedings upon the objections of appellant. The meaning of the provision that "only one transcript of the final order of the board of supervisors fixing the apportionments or benefits shall be required" is not quite clear; but, the entire proceedings leading up to the assessment

being in the record, there was sufficient before the court to allow the appellant to call to its attention any matter which he believed affected his interests injuriously, and this would seem to comply with the intent of the statute.

2. It is insisted that the statute as amended in 1909 is unconstitutional for the reason that the amendment took away from the landowner the right to recover any damages he might suffer by reason of the proposed improvement, by omitting certain provisions as to such damages; that it was the evident intention of the legislature of 1909, by omitting these provisions, to compel him to suffer damage to his property without compensation; and that hence the amended act violates section 21, art. I of the constitution. Section 12 of the original act (laws 1905, ch. 161), which section was not affected by the amendment of 1909, provides generally for the condemnation of right of way, and further provides that, after the appointment of appraisers, "the same proceedings for condemnation of such right of way shall be had, in all other respects, as is provided by law for the condemnation of rights of way for railroad corporations, the payment of damage and the rights of appeal shall be applicable to the drainage ditches and other improvements provided for in this act." The provision of the act as amended seems to leave the law as to damages in much the same condition as that with reference to the ascertainment of damages to property occasioned by the construction of a railway or the opening of a highway. In such proceedings the appraisers, and on appeal the jury, must allow the landowner the value of the land actually taken, and incidental damages to that portion of his land not appropriated, less any special benefit which may accrue by reason of the improvement. *Wagner v. Gage County*, 3 Neb. 237. In the taking of property for a drainage district these principles apply, as modified in *Gutschow v. Washington County*, 74 Neb. 794. *Martin v. Fillmore County*, 44 Neb. 719; *Dodge County v. Acom*, 61 Neb. 376. It is held by some courts that such provisions in a constitution apply only

to the exercise of eminent domain, and are no defense in proceedings to specially assess property for special improvements according to benefits (*Keith v. Bingham*, 100 Mo. 300, 13 S. W. 683; *Householder v. City of Kansas*, 83 Mo. 488); the thought being that, the assessment being made under the taxing power and the damages being caused by the exercise of the right of eminent domain, one cannot be offset against the other, although the party injured may have his action under the constitution for the damages sustained. But this question is not involved here and is not decided. It is also said by appellant in this connection that an action cannot be maintained against the district for damages in the absence of express statutory provision therefor, and that hence if lands are not actually taken, but only incidentally damaged, the injured party has no means of recovery. But a drainage district formed under this statute is a public corporation (*Drainage District No. 1 v. Richardson County*, 86 Neb. 355) and, as such, liable to pay for lands taken or damaged whether the obligation is enforced by condemnation proceedings or by civil action. Under section 37 of the act it may sue and be sued. The constitution is the supreme law; and, even if the statute failed to provide a special proceeding against the corporation for damages, the mere failure to do so will not operate to take away from a person damaged his right to the ordinary process of the law to ascertain and recover the same. *Chicago, R. I. & P. R. Co. v. O'Neill*, 58 Neb. 239, and cases cited. We think no such change was made by the amendment of 1909 as to render the amended act unconstitutional.

3. It is argued that the court had no jurisdiction because no complete topographical survey of the district had been made and filed as required by law. The engineer's report is accompanied by detailed maps and profiles of the proposed work in accordance with provisions of section 9, ch. 161, laws 1905, which was in effect when the survey was made and maps filed. At that time the statute required the engineer to make "a topographical survey,"

and to submit to the board "maps and profiles of the same" and a full and complete plan for drainage, etc. The amendment of 1909 makes no substantial change, except to say that there shall be a "complete" topographical survey. The witness Munn, who was the engineer in charge, stated upon the witness-stand that the maps filed did not show a "complete" topographical survey, but that he had made a topographical survey proper for such an enterprise, and that the maps and profiles showed all the elevations necessary for the work, that he took 10 to 14 elevations upon each 40 acres, and that, although there are no contour lines marked, the maps and profiles are sufficient to indicate the lands which would be benefited by the improvement, and gave the information necessary to enable contractors to estimate and bid upon the work. While a more minute survey and more detailed maps showing contour lines at short intervals could have been made, the maps and profiles in evidence seem to be in substantial compliance with the statute, and were sufficient to inform the landowners, the board of supervisors and the district court of the scope and extent of the proposed improvements and the lands which would be affected thereby.

4. In the execution of the general scheme of improvement, a number of lateral ditches are provided for which are designed to relieve part of the land, which is liable to overflow in times of flood in the Little Nemaha river, from excessive accumulations of surface water coming from other sources, and which accumulations find their discharge by way of the river. One of these laterals is a distance of several miles from the lands of the appellant. He claims that the drainage district had no power to include the construction of such laterals within its scheme or plan of drainage, for the reason that, when he signed the petition for the creation of a drainage district, the object and purpose expressed was to straighten the channel of the Little Nemaha river by changing the channel where necessary, and cleaning the old channel, and do

"any and all things which the board of supervisors of said district may deem necessary to straighten and clean out the channel of said river, and to prepare, protect and maintain said improvements." It is said that the inclusion of lateral ditches in the plan was beyond the power of the corporation, and that an assessment based upon such a scheme could not bind the appellant, who had never consented to the same. The power to create a drainage district corporation is conferred by section 1, ch. 161, laws 1905. Under its provisions "a majority in interest of the resident owners in any contiguous body of swamp or overflowed lands in this state * * * may form a drainage district for the purpose of having such lands reclaimed and protected from the effects of water, by drainage or otherwise, and for that purpose may make and sign articles of association, in which shall be stated the name of the district, the number of years the same is to continue, the limits of the proposed drainage district, which shall in no event embrace an area of less than 160 acres, the names and places of residence of the owners of the land in said district, * * * and said articles shall further state that the owners of real estate so forming said district for said purpose are willing and obligate themselves to pay the tax or taxes which may be assessed against them to pay the expenses to make the improvements that may be necessary to effect the drainage of the said lands so formed into a district," etc. It is further provided that, after the articles have been signed, they shall be filed in the office of the clerk of the district court in the county in which said drainage district is located. Section 2 provides for the service of notice of the filing of articles. Section 3 provides that all owners of real estate in the district who have not signed the articles shall file their objections in the district court, "if any they may have, why such drainage district should not be organized and declared a public corporation of this state." The provisions of the statute and the decree of the district court declaring the drainage district a public corporation con-

stitute the charter of the corporation. It will be seen that the corporation is formed "for the purpose of having such lands *reclaimed and protected from the effects of water, by drainage or otherwise,*" and the petitioners obligate themselves "to pay the tax or taxes which may be assessed against them to pay the expenses *to make the improvements that may be necessary to effect the drainage* of the said lands so formed into a district." Expressions in a petition indicating the manner in which the petitioners desire or would prefer to have the scheme of drainage carried out cannot control or fetter the corporation in the exercise of its discretion in the adoption of plans to carry out the purpose of its creation, and are mere surplusage. So long as the officers of the corporation keep within the powers conferred upon them by its charter, the petitioners cannot complain. To hold that an enterprise requiring technical skill and knowledge of a high degree in order to successfully prosecute the same, and necessitating the expenditure in some instances of hundreds of thousands of dollars, can be limited in such a manner would substitute the judgment of the unskilled for that of experts, and would subject the property of other owners of land in the district to the risk of being sacrificed in order to pay the expenses and costs of ill-advised and immature schemes. We are of opinion that the powers granted by the statute cannot be limited in such a manner. Moreover, we think the power of the corporation to carry out as a part of its general purpose the drainage of the lands included within the district from surface water, as well as that arising from overflows, cannot be questioned in this collateral manner.

5. It is next objected that the court erred with regard to the assessment of the cost of the laterals upon the appellant's land, when in fact he derived no benefit therefrom. The report of the engineer states: "The primary object of this undertaking is to reduce the numbers and extent of the overflows from the river. The work of reclaiming the valley lands is not complete, however, until

adequate surface drainage is provided. Lateral ditches, 35 in number and aggregating 35 miles in length, have been laid out to complete the work of draining the valley." We think that the testimony bears out the conclusion that lateral ditches were proper and necessary in order to accomplish the result contemplated by the improvement. The method of assessment is explained in the engineer's report, as follows: "There are in round numbers 21,800 acres of land benefited by this improvement. The maximum benefit to the land is estimated at \$40 per acre. In arriving at the degree of benefit to the various tracts, those lands receiving the maximum benefit were classified at 100, and other tracts receiving less than the maximum benefit were classed in percentages of the maximum. Land now worth \$60 per acre that will ultimately sell for \$100 per acre, when relieved of the uncertainty of overflow and is afforded ample drainage, is of course classified at 100. Very wet swamp land now worth say \$20 an acre that will be made safe from the overflows of ordinary years and the value of which would be to \$60 an acre is also classed at 100. * * * The benefits to certain tracts are increased by the proposed lateral ditches. The laying out of the lateral ditches in fact necessitated the including for benefits of land that otherwise would not have been listed. After the land was scheduled by percentages the amount of benefit to each tract was arrived at by extending the number of acres in the tract by \$40 if the tract was classified at 100, or at the per cent of \$40 the land was classified at. The cost of the improvement then apportioned to each tract bears the same ratio to the total cost that the amount of benefits bears to the total benefits."

It will be seen that, additional assessable land being brought within the district by reason of the laterals, the total cost was distributed over a greater number of tracts than before. We have nothing before us to indicate that the assessment on the additional land brought in would not operate to equalize the added cost. Moreover, it seems

clear from the testimony of the engineer and the elevations marked in the plats that the laterals were necessary to fully accomplish the drainage of the district, and that while the land of the appellant was not directly benefited by each lateral it was in fact benefited by the carrying out of the entire scheme. Without the laterals, it seems that water from excessive rains flowing into the valley from the higher land adjacent and water from unusual overflows would be retained in stagnant pools and ponds in various places, the remedying of which condition it was one of the principal objects of the improvement to effect. In the engineer's report the land throughout the district is not assessed at the same rate. He testifies that some of the lands assessed derive their principal benefit from the improvement in the channel of the river, while others are so situated that from the river improvement alone they would not receive the maximum benefit, without the aid to their reclamation afforded by the construction of the laterals, and that in making the assessment these elements were considered. The evidence shows the laterals were necessary to the drainage of the district, and the mere fact that some of them were not so situated with respect to appellant's land as to confer a direct and immediate benefit on it cannot operate to relieve his land of its fair proportion of the common burden.

6. It is objected that the benefits which may accrue are so speculative and conjectural in their nature that it is impossible to ascertain the same until after the construction of the improvements. This objection, however, would be equally applicable to proceedings for the ascertainment of damages occasioned by the laying out of highways or the building of railroads. Furthermore, if no assessment and levy could be made until after an improvement of this nature was completed, common prudence on the part of engineers and contractors would no doubt operate so that it would be a long time before the land would be relieved from overflow.

7. Appellant insists that the court erred in refusing a

trial of the issues in the case by a jury. This question, however, together with a number of other complaints with regard to the constitutionality of the act, was disposed of in *Dodge County v. Acom*, and in *Drainage District No. 1 v. Richardson County*, *supra*, and will not be noticed further.

8. We find no justification for the complaint that the board of supervisors was disqualified by reason of the fact that certain of the members were landowners in the district. The statute expressly requires that the board shall "be composed of owners of real estate in said district and resident of the county or counties in which such district is situated." Laws 1905, ch. 161, sec. 5. There is no evidence of and no complaint is made as to any misconduct on the part of any member of the board.

9. It is insisted that the court erred in many respects with regard to the admission and exclusion of evidence with relation to the lateral ditches, as to their effect upon the land in the district generally, the effect of the growth of vegetation in them, the necessity for their existence, and the effect that overflow would have upon them. The hearing was before the court, hence, under the settled rule, the admission of incompetent and immaterial testimony could not be prejudicial, and we are unable to find any prejudice to appellant by the exclusion of that which was offered by him and refused.

10. Having disposed of these general objections to the validity of the assessment, we come now to the complaint that the assessment against Marconnit's land as fixed by the board and confirmed by the court is too high and out of proportion to the assessment against other lands similarly situated. At the outset it is well to say that a uniform and exact apportionment of the benefits to each tract of land is an impossibility in most cases. The most that any officer or tribunal can do is to estimate the benefits to each tract upon as uniform a plan as may be in the light afforded by the evidence and by a personal examination and inspection. We have read the evidence with

much care in respect to the varying conditions in the three government subdivisions of Mr. Marconnit's land, the assessment as to which is in issue in this appeal. In considering his original complaint after a personal view of the land and the examination of witnesses, the board of supervisors found that certain portions were not benefited and should not be assessed, that part of it should be assessed on a basis of 60 per cent. and part of it at 100 per cent. Marconnit's own evidence shows that the land assessed is properly within the drainage district and subject to assessment. The estimate made by the witnesses in his behalf of the amount that the value would be enhanced by the construction of the improvement is much lower than that arrived at by the board and by the district court, but we are unable to say from a consideration of all the testimony produced that the finding and determination of the district court is erroneous. It is impossible within the limits which we are justified in devoting to this opinion to set forth in detail the evidence as to the value of each tract and the special benefit which it will sustain by the improvement. It is confused and indefinite at the best, and it is a difficult task for a reviewing court to form any just conception of actual conditions merely from the reading of the testimony. It seems clear that other land in the vicinity, lying at a lower elevation, and which would be covered with water when a portion of appellant's land was still above the flood, was also assessed at the rate of 100 per cent., but this alone is not sufficient to justify a finding that the assessment of these tracts is lacking in uniformity and is unjust and inequitable.

The appellant has not convinced us that the findings of the district court should be disturbed, and its judgment is, therefore,

AFFIRMED.

FAWCETT, J., not sitting.

CITY OF SOUTH OMAHA, APPELLEE, v. OMAHA BRIDGE &
TERMINAL RAILWAY COMPANY, APPELLANT.

FILED JANUARY 3, 1912. No. 16,576.

1. **Eminent Domain; CONDEMNATION OF STREETS; DAMAGES.** A common carrier in 1901 by condemnation proceedings acquired the right to construct and maintain turnouts and tracks for the storage of cars upon parts of an alley and two streets within the city of South Omaha. *Held*, That the city, under the peculiar provisions of its charter and the facts in this case, should recover substantial damages.
2. ———: ———: ———: **EVIDENCE.** In such a case, the issue having been tried to the court without the assistance of a jury, the judgment will be affirmed if there is sufficient competent evidence to sustain the recovery.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Affirmed*.

W. S. Kenyon, Kelleher & O'Connor and William Baird & Sons, for appellant.

H. C. Murphy and S. L. Winters, *contra*.

ROOT, J.

This is the second appeal in this case. Our former opinion, published in 76 Neb. 718, is referred to for an understanding of the facts. The second trial was to the court without the assistance of a jury.

The railway company contended that the city should recover no more than nominal damages, and was permitted to prove by the testimony of experts that the value of the use by the city of those parts of the alley and the streets in controversy was not impaired by the use for railway purposes. The city, on the other hand, was permitted to prove that the land embraced within the parts of the alley and the streets condemned was worth from \$2,100 to \$2,500, but that subject to the use by the railway company was worth but \$500. The court found that the effect of

the condemnation is to vacate the territory for street and alley purposes, and that the market value of the land is \$900, for which sum judgment was rendered. There are no other findings.

The appellant contends that, since section 83, ch. 16, Comp. St. 1901, authorizes municipal corporations to agree with a railroad company upon the terms and conditions upon which public streets, alleys and grounds may be occupied and used by the company, and that if they cannot agree those rights may be acquired by condemnation, the appellant could not and did not acquire title to the land, and the damages, in the nature of things, could be no more than nominal. In support of this argument our attention is directed to the evidence, which informs us that the railway company owns three blocks of land situated parallel to the right of way of the Belt Line railway, over which the appellant propels its engines and cars; that the parts of the alley and streets in controversy run at right angles to, and terminate at the east side of, this right of way, and that they have not been opened for public use, but at the time of the condemnation were included within an inclosure which also included the blocks purchased by the railway company.

Reference is made in our former opinion to the peculiar provisions of section 20, art. II, ch. 13, Comp. St. 1901, which apply to the city of South Omaha, whereby the owners of real estate abutting on the part of any street sought to be vacated must pay into the city treasury the appraised value of that part of the highway before an order of vacation can lawfully be rendered. This statute vests the city with a valuable interest in the streets and highways within its limits, although it may not bargain and sell that interest to any person the authorities may choose.

The railroad company did not in its petition apply solely for a right of way across the streets and the alley for a main line, or a main line and side-tracks, but stated that it needed the territory for, among other things, the storage of cars. This right, when acquired, would be so

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inconsistent with the use for ordinary highway traffic, that the parts of the streets and the alley for all practical purposes were vacated. Should the city formally vacate the alley and the streets, it could only do so subject to the easement of the railway company, and the land thus burdened in perpetuity would be practically worthless to the owner of the fee. While the legal consequences attendant upon a vacation may not flow from the condemnation, the practical present results are the same, so far as the city is concerned, and it should recover substantial damages. There is no prejudicial error.

There is sufficient competent evidence to sustain the award of damages, and the judgment of the district court is therefore

AFFIRMED.

JOHN GASTER ET AL., APPELLEES, V. ESTATE OF FREDERICK GASTER, APPELLANT.

FILED JANUARY 3, 1912. No. 17,057.

1. **Husband and Wife: SEPARATION: RECONCILIATION.** Reconciliation between and a renewal of cohabitation by husband and wife will abrogate articles of separation theretofore executed by them.
2. **Wills: ELECTION, TIME OF: INSANE SPOUSE.** Section 7, ch. 23, Comp. St. 1911, which provides, in substance, that unless a surviving spouse, within one year after letters testamentary are issued on the estate of a spouse dying testate, files with the county judge a written election to inherit the deceased's estate as though he had died intestate, the survivor shall be deemed to have consented to take under the will and not under the law, will not prejudice an insane spouse for whom the county judge has made no election.
3. ———: **ELECTION: INSANE SPOUSE.** An oral demand by the guardian *ad litem* of an insane widow, made to the county judge at the time the decree of distribution is entered in the matter of her deceased husband's estate, that she should receive a share of the estate as though the husband had died intestate, if approved by the county judge, constitutes an election for her by him and is sufficient to sustain her rights under the law.

APPEAL from the district court for Cuming county:
GUY T. GRAVES, JUDGE. *Reversed with directions.*

P. M. Moodie and John J. Sullivan, for appellant.

A. R. Oleson, *contra*.

ROOT, J.

This is an appeal from a judgment of the district court for Cuming county denying Theresa Gaster any interest in the estate of her deceased husband.

This controversy grows out of a contract between Frederick Gaster, the deceased, and his widow, who is now insane. The evidence is not so satisfactory as we might desire, but the record discloses that some time preceding April 30, 1881, Frederick Gaster, a widower, and Theresa Gaster, a widow, each having children by a former marriage, became husband and wife. On the day last mentioned these parties signed a contract as follows:

"Memoranda of articles of separation, and agreement of property settlement made and concluded this 30th day of April, A. D. 1881, by and between Frederick Gaster and Theresa Gaster (husband and wife) of the county of Cuming and state of Nebraska, witnesseth as follows, to wit:

"It is hereby specially agreed by and between said parties that from the signing of this agreement said parties will live separate and apart from each other, and each for themselves promises and agrees not to interfere or meddle with the personal actions of the other, and each is hereby empowered to follow their course of life the same as if no marriage relation existed between them, and no control shall be used by either over the actions of the other.

"It is hereby agreed by said parties that the said Frederick Gaster hereby releases all rights, interest, claim, demand and privileges in or to any or all the real estate

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or personal property now owned by said Theresa Gaster (as her own personal estate) as well as any and all personal property which the said Theresa Gaster may in the future acquire.

"The said Theresa Gaster hereby covenants and agrees that she the said Theresa Gaster by these presents hereby releases all rights, interest, claims, demands, privileges and dower in and to any and all the real estate and personal property now owned by said Frederick Gaster as well as to any and all property which the said Frederick Gaster may in the future acquire.

"It is further agreed that said Theresa Gaster shall alone be entitled to the possession of the farm owned by her in said county and the said Frederick Gaster to be alone entitled to the possession of the farm owned by him, and it is agreed that this shall be a full, complete and entire settlement of the property real and personal owned by said parties, and to be acquired by either of them in the future.

"The said Frederick Gaster hereby covenants and agrees that the said Theresa Gaster shall have the right and privilege to remove from the farm of the said Frederick Gaster all the personal property, furniture, paraphernalia and goods owned by the said Theresa Gaster, brought by the said Theresa Gaster to said Fred Gaster at the time of their marriage, and also the right to remove all personal property acquired by said Theresa Gaster since said marriage.

"It is hereby agreed by and between said parties that said Theresa Gaster shall be entitled to the possession of Theresa Maria Gaster, aged two years, born to said parties during said marriage, and it is hereby agreed that said Frederick Gaster at all reasonable times shall have the right to visit and see his said child, and make such provision for said child as to him the said Frederick Gaster may deem just. That when said child shall arrive at the age of ten years she shall have the right to choose between said parents. After said choice either

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of said parties shall have the right to see said child as above.

"Signed this 30th day of April, 1881.

"In presence of

"T. M. FRANCE.

F. GASTER.

"JEROME VOSTROSKY.

THERESA GASTER."

The execution of this contract was acknowledged before a notary public. The parties did not separate, but continued to cohabit as husband and wife, and in 1884 another child was born to them. In 1886 Theresa Gaster was adjudged insane and committed to one of the state hospitals for the insane, where she is still restrained of her liberty. On July 23, 1892, the contract was recorded in the office of the register of deeds of Cuming county. In 1901 Frederick Gaster executed his last will and testament, wherein and whereby all of his property is devised to his children, and no provision is made for his widow. In 1908 Gaster departed this life, and this will was subsequently admitted to probate in the county court of Cuming county. The contract was filed in the county judge's office at the time the will was probated. The estate has been administered. In March, 1910, in the decree of the county court of Cuming county distributing the residue of the personal property, one-fourth of the estate is adjudged to belong to the widow. At no time did the guardian of the insane woman, or any one in her behalf, file in the county judge's office an election that she would take an interest under the law in the estate of her deceased husband, or renouncing the will, but the guardian *ad litem*, before the decree of distribution was entered, orally stated to the county judge that he demanded for the insane woman one-fourth of her deceased husband's estate. The district court on appeal held that by the terms of the contract the widow "released all right, interest, claim, demand, privileges and dower in and to any and all of the real estate and personal property then owned by the said Frederick

Gaster, as well as to any and all property which the said Frederick Gaster may in the future acquire," and vacated the order of the county court.

We find little, if anything, in this contract to merit the approval of the law. It will be observed that the husband makes no provision for the support of his wife, nor yet for that of his infant child. At the time the writing was signed Gaster had no expectant interest in his wife's estate that could not have been cut off by her will. He had absolutely no right to control her property or to receive any part of the rents or profits therefrom, while she, by reason of the marital relation, had an inchoate dower estate in his lands which he could not bar without her deed, and a life estate in the homestead, if one existed. She also had the right to maintenance and support during her husband's life, and after his death, should she survive him, was entitled to liberal allowances by way of maintenance, and, if he died intestate, would be entitled to share in the distribution of his personal property. This right before his death was enlarged by legislation. We would be surprised to learn that such a contract had received judicial sanction in a court of last resort. But, however that may be, if it be conceded for the sake of argument that the contract was valid in its inception, it was abrogated by the subsequent conduct of the parties, and all of their marital rights were thereby restored. The controlling principle is ancient, and, so far as we are advised, has been enforced in an unbroken line of decisions wherever its integrity has been questioned. *St. John v. St. John*, 11 Ves. Jr. (Eng.) *526, *536; *Angier v. Angier*, Gilb. Rep. (Eng.) 152, 25 Eng. (reprint) 107; *O'Malley v. Blease*, 20 Law T. Rep. n. s. (Eng.) 899, 17 Weekly Rep. (Eng.) 952; *Nicol v. Nicol*, 55 Law J. Ch. n. s. (Eng.) 437. The last case is peculiarly in point, because the wife, after deeds of separation had been executed, cohabited for a short time with her husband, and subsequently became insane, and it was held that the deeds were annulled by the resumption of

marital relations. See, also, *Kehr v. Smith*, 20 Wall. (U. S.) 31; *Shelthar v. Gregory*, 2 Wend. (N. Y.) 422; *Smith v. King*, 107 N. Car. 273; *Stebbins v. Morris*, 19 Mont. 115; *Knapp v. Knapp*, 95 Mich. 474. In the instant case, not only were the marital relations uninterrupted, but a child was born subsequent to the execution of the contract. The fact that the instrument was filed for record six years after the wife became insane suggests the thought that the husband adopted a doubtful expedient in an attempt to relieve his property from this helpless woman's lawful demands. But, irrespective of motives, the instrument, in the circumstances of this case, is null and void.

It is argued, however, that since no election to take under the law was filed in the office of the county judge, and more than one year elapsed between the date of the letters testamentary and the entry of the decree of distribution, the widow is not entitled to the benefit of sections 1, 6, 7 and 176, ch. 23, Comp. St. 1911, which provide for the descent and distribution of the estates of deceased persons, and permit the widow, within one year after letters testamentary issue, to renounce the provisions of the will and take under the law. If it be conceded that the duty to elect exists and should be exercised by a widow for whom no provision is made in the will, we think that section 7, *supra*, which relates to time, does not bind an insane surviving spouse while in that mental condition. In the case at bar, the fact that the widow was insane having been made known to the judge, it was his duty to order such an election as would best protect her interests. While a formal election was not made, the oral demand of the guardian *ad litem* for one-fourth of the testator's estate was treated by the judge as his own act, became so by adoption, and was sufficient to protect her rights in the premises. The admission of the will to probate established only its due execution. So far as her interest in the real estate may be concerned, the order of the probate court would not prejudice her rights as against the devisees.

The judgment of the district court, therefore, is reversed and the cause remanded, with directions to affirm the judgment of the county court.

REVERSED.

STATE, EX REL. FRANK M. TYRRELL, COUNTY ATTORNEY,
APPELLANT, V. LINCOLN TRACTION COMPANY, AP-
PELLEE.

FILED JANUARY 3, 1912. No. 17,232.

1. Quo Warranto: CORPORATIONS: USURPATION OF POWERS: ADMISSIONS: PARTIES. "An information in the nature of a *quo warranto* filed against a corporation by its corporate name admits the existence of the corporation. If the charge be that the corporation is exercising powers not given by its charter, the action proceeds against the corporation to oust it from the use of the usurped power; but, where it is claimed that corporate powers are being usurped by a body which has no corporate existence, then the action must be against the individuals who are usurping corporate rights." *State v. Lincoln Street R. Co.*, 80 Neb. 333.
2. Street Railways: CONSOLIDATION: CONSTITUTIONAL PROVISION. Section 3, art. XI of the constitution, which prohibits the consolidation of the stock, property, franchises or earnings in whole or in part of railroad corporations and telegraph companies owning parallel or competing lines, does not apply to street railway corporations not engaged in general railroad or telegraph business.
3. ———: ISSUANCE OF STOCK: CONSTITUTIONAL PROVISION. Section 5, art. XI of the constitution, which forbids a railroad corporation issuing any stocks or bonds except for money, labor or property actually received and applied to the purposes for which such corporation was created, does not apply to street railway corporations not engaged in general railroad business.
4. ———: CONSOLIDATION: DISSOLUTION: EVIDENCE. The mere fact that the directors of two street railway corporations, which are consolidated by virtue of the provisions of sections 6-12, art. VII, ch. 72, Comp. St. 1907, agreed to an exchange of the stocks and bonds and the assets of the constituent corporations for the consolidated corporation's stocks and bonds, the aggregate par value whereof greatly exceeds the value of the tangible assets of the constituent corporations, is not in itself such proof of fraud as will justify a dissolution of the consolidated corporation.

5. ———: VALUATION; EARNINGS; FARES. The valuation thus placed on the assets of the constituent corporations will not bind the railway commission in estimating the valuation upon which the corporation should earn an income, or in fixing the price the carrier may charge for transporting passengers.
6. ———: POWER OF COURTS: CANCELATION OF STOCK. A franchise to be and to do as a public service corporation is held in trust for the public, as well as for the profit of the stockholders, and it is competent for a court of general jurisdiction, having jurisdiction of the subject matter and of the parties in interest, to cancel bonds and stocks issued without consideration by such a corporation, where, to permit them to gain currency, will seriously impair its ability to discharge its duty to the public.
7. ———: CONSOLIDATION: INCREASE OF STOCK: CANCELATION. But if, in a consolidation of constituent street railway companies which theretofore satisfactorily served the public, all of their tangible property is conveyed to the consolidated corporation and subsequently improved, the mere fact that the stock and bond issues of the constituent corporations were doubled by the consolidated corporation, without greatly adding to the tangible assets, will not justify a cancellation of that stock.
8. ———: ———: CANCELATION OF STOCK. And if to cancel one class of that stock will take from part of the stockholders the consideration for their agreement to consolidate the constituent corporations and will not interfere with the consideration received by other stockholders, none of the stock should be canceled if the consolidation be permitted to continue.
9. *Quo Warranto*: DEFENSES. In proceedings *in quo warranto* prosecuted by the county attorney or the attorney general, the respondent should either disclaim or justify exercising the challenged franchise, and, in the latter event, should plead the precise authority for his or its conduct.
10. ———: PLEA OF JUSTIFICATION: BURDEN OF PROOF. And if the plea of justification is traversed by the reply, the burden is upon the respondent to establish his right.
11. ———: JUDGMENT AS BAR: CAUSES OF ACTION. A judgment responding to the sole issues, confirming the respondent's right to be and to exercise the franchises of operating a street railway, is no bar to subsequent *quo warranto* proceedings challenging the respondent's right to exercise the franchise of manufacturing, selling and distributing electric current for illumination and power purposes, or operating a heating plant in the same city, nor did the state split its cause of action by failing to include

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in its first information a complaint with relation to the exercise of the last described franchise.

12. Judgment on Appeal. The respondent having failed to sustain the burden of proof cast upon it by the issues joined and the law, and the charges in the information being severable, the judgment will be affirmed as to those issues which the evidence discloses were properly determined, and reversed as to those upon which there is a failure of proof.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed in part and reversed in part.*

J. B. Strode and F. M. Tyrrell, for appellant.

Charles S. Allen and Hainer & Smith, contra.

ROOF, J.

This is an appeal by the state from a judgment in the respondent's favor on the issues joined in *quo warranto* proceedings.

In January, 1909, the Lincoln Traction Company and the Citizens' Railway Company, corporations, were separately operating lines of street railway in the city of Lincoln. The traction company also controlled a heat, light and power plant within that city. At this time the Citizens' Railway Company had outstanding \$415,000 capital stock, which the railway commission subsequently found represented the investment of money and services of the reasonable value of \$399,000. This corporation was organized about 1905, and there is uncontradicted evidence tending to prove that the increase in the market value of materials used in the construction of that railway at least equalled the depreciation thereof by use intermediate the organization of this corporation and February, 1909.

The traction company in January, 1909, had outstanding \$700,000 of common stock, \$189,000 of bonds, and a floating debt of \$61,000, or gross liabilities of \$1,280,000.

The amount of money invested by this corporation and its predecessors in interest in the properties of this corporation cannot be so definitely ascertained, because the traction company in 1909 was the successor in interest of several street railway companies that some 20 years previously constructed and subsequently operated distinct railway systems in that city. By an inevitable process of evolution, the original equipment of those railways was discarded, the ways improved, and the motor power changed from horse to electricity. In September, 1907, the railway commission found that the original cost of the properties of the traction company was \$1,660,000, and that \$606,000 had been expended in additions and improvements. We are not advised by the record whether any part of this \$2,266,000 represents money expended for such ordinary maintenance as should be charged to operating expenses. If so, to that extent the expenditure would be no more of an investment than the money paid for wages or taxes. It seems, however, that the railway commission found that at the time of the hearing the total replacement value of the street railway was \$1,100,000, and that the company's expert fixed that valuation at \$1,151,672. As we understand the record, the traction company also had invested about \$350,000 in subsidiary heat, light and power organizations. While the evidence is not definite, we are of the opinion that the heating plant was constructed and is ostensibly operated by a separate corporation. Whether the light and power industry is owned by a distinct corporation, separate from the street railway company, we are not definitely advised by the proof, but our impression is that the respondent assumes ownership of and the right to enjoy those franchises without the intervention of any other corporation or other person. The traction company was then earning net upon all of its properties \$116,000 per annum.

February 1, 1909, the directors of these corporations, assuming to act under the provisions of section 6 *et seq.*,

art. VII, ch. 72, Comp. St. 1907, entered into a contract of consolidation, by the terms of which all of the property, tangible and intangible, of the constituent corporations was to become the property of the new corporation, which was also to be known as the Lincoln Traction Company. The authorized bond and stock issue of the new corporation is as follows: \$1,500,000 of bonds, \$250,000 of which were appropriated to retire the bonds issued by the elder traction company and the floating indebtedness; \$1,500,000 of preferred stock entitled to a cumulative dividend of 6 per cent. per annum; and \$2,000,000 of common stock entitled to the residue of the net earnings of the company. \$770,000 of the new bonds were to be exchanged for the \$700,000 preferred stock of the elder traction company. Holders of the \$330,000 common stock of the elder company were to receive two shares of preferred stock and four shares of common stock in the consolidated corporation for every share of their common stock. The holders of the \$415,000 stock issued by the Citizens Railway Company received a like amount of the preferred stock of the consolidated company and \$332,000 of the common stock of that corporation. Provision was also made, in accordance with the requirements of the statute, to ascertain the value of and to pay in cash for any stock of either constituent corporation which the holder refused to exchange for stock in the consolidated corporation. The agreement was executed in triplicate, one copy whereof was filed in the office of the secretary of state, and one copy in the office of the county clerk of Lancaster county, and one copy was retained by the consolidated corporation. The agreement was accepted by more than two-thirds of the stockholders of the constituent corporations, and, so far as we are advised, no stockholder or creditor of either corporation has taken any exception to the proceedings. The result of this transaction was to increase by \$770,000 the bonded debt of the combined corporations, to increase by \$375,000 the preferred stock, and the common

stock was increased \$1,322,000. In other words, before consolidation the gross stock and bonds liability of the constituent companies was \$1,695,000, and, immediately after, that liability aggregated \$3,747,000, an increase of \$2,052,000.

There is considerable evidence concerning the value of the combined properties, and, as might be expected, the opinions are not harmonious, nor, in the view that we take of the case, is that fact material. The sole respondent is the consolidated corporation, sued in its corporate name. By this proceeding the state is estopped in this action to question the corporate existence of the respondent, nor has it made those persons parties upon whom a judgment of ouster could operate. *State v. Uridil*, 37 Neb. 371; *State v. Lincoln Street R. Co.*, 80 Neb. 333.

The state invokes article XI of the constitution to sustain its contention that the stock and bond issues should be canceled and the consolidation adjudged null and void. Among other things, section 3, art. XI, *supra*, forbids the consolidation of the stocks, property, franchises or earnings of two or more railroad corporations or telegraph companies owning competing or parallel lines, and section 5 of that article provides that no railroad corporation "shall issue any stock or bonds, except for money, labor or property actually received and applied to the purposes for which such corporation was created; and all stock, dividends, and other fictitious increase of the capital stock or indebtedness of any such corporation shall be void."

In *City of Lincoln v. Lincoln Street R. Co.*, 67 Neb. 469, 483, it was suggested, but not determined, that these provisions of the constitution do not apply to street railway companies. In the instant case we are of opinion that the point is fairly presented and should be determined. No such limitations appear in the constitution of 1866. It is a matter of common knowledge that many of the provisions of our constitution were taken from the

1870 constitution of Illinois. Sections 3 and 5, art. XI of the constitution of Nebraska, are quite similar to sections 11 and 13, art. XI of the 1870 constitution of Illinois. In 1870 the agitation which gave birth to the granger laws of the western states was active, and the people of Illinois were determined that competition should continue between the common carriers for hire of freight and passengers. These conditions existed in a more acute form in Nebraska in 1875, when our present constitution was adopted. The evils growing out of the circulation of railroad stocks and bonds that had been issued without consideration or for a grossly inadequate consideration were also known in 1870 and in 1875. But, so far as we are advised, street railways were not during those years considered an inviting field for exploitation, and the people of Nebraska gave that subject no more thought than to adopt section 4, art. XI, *supra*, which forbids the general assembly to grant the right to construct or operate a street railway within the limits of any city, town or incorporated village, without the consent of the local authorities having control of the streets and highways of the municipality. As we are advised, but one street railway had been constructed in this state in 1875.

In section 72 *et seq.*, ch. 25, Rev. St. 1866, may be found comprehensive provisions for the incorporation by general law of railroad companies. But it was not until 1877 that the legislature enacted statutes referring specifically to the incorporation of street railway companies. Laws, 1877, p. 135. It is not improbable that theretofore such corporations might have been formed under the provisions of section 123 *et seq.*, ch. 25, Rev. St. 1866, relating generally to corporations, yet in 1867 the territorial legislature granted a special charter to the Omaha Horse Railway Company to construct and operate a street railway in the city of Omaha and within a radius of five miles of its limits. The legislature, by the act of February 25, 1875, purported to grant to the

first corporation that should build and operate a street railway in any of the cities in Nebraska exclusive franchises for 25 years. 2 Complete Session Laws, p. 884. In 1875 Omaha was the only city in Nebraska containing sufficient population to justify the maintenance of a street railway. At that time there were no evil practices with respect to street railways to be remedied in Nebraska and no reason to expand by construction the popular definition of the word "railroad." In its broadest significance that word includes a street railway, but its meaning depends upon the context and general intent of the written law in which it is used. *City of Chicago v. Evans*, 24 Ill. 52. Because the administrative branch of the government, by a practical construction of a revenue law, had construed the word "railroad" to mean street railways, the supreme court of Florida so held. *Bloxham v. Consumers E. L. & Street R. Co.*, 36 Fla. 519, 51 Am. St. Rep. 44. But it is said in substance in that case, by Liddon, J., that the word generally applies to commercial railways engaged in the transportation for long distances of freight and passengers, whereas the words "street railway" apply solely to railways laid upon the surface and grade of the street, and so constructed as not to exclude the public from the use of that part of the street. In *State v. Duluth Gas & Water Co.*, 76 Minn. 96, 107, Mitchell, J., in classifying street railways and railroads, said: "Speaking generally, a street railway is local, derives its business from the streets along which it is operated, and is in aid of the local travel upon those streets, while a commercial railway usually derives its business, either directly, or indirectly through connecting roads, from a large area of territory, and not from the travel on the streets of those cities, either terminal or way stations, along which they happen to be constructed and operated. In fact, so far from being an aid or advantage, they are a positive impediment to the travel on such streets." See, also, *Carli v. Stillwater Street R. & T. Co.*, 28 Minn. 373; *Minneapolis & St. P.*

S. R. Co. v. Manitou Forest Syndicate, 101 Minn. 132; *Louisville & P. R. Co. v. Louisville City R. Co.*, 2 Duv. (Ky.) 175; *Lincoln Street R. Co. v. McClellan*, 54 Neb. 672.

The terms of a constitution should be construed according to their plain and ordinary acceptance unless it is evident they were used in a legal or technical sense. *State v. Bacon*, 6 Neb. 286; *State v. Lancaster County*, 6 Neb. 474; *Hamilton Nat. Bank v. American Loan & Trust Co.*, 66 Neb. 67; *Wilcox v. People*, 90 Ill. 186, 196.

Considering the mischief which article XI of the constitution was adopted to remedy, the general history of the state in 1875, and giving the words in sections 3 and 5 of that article their ordinary meaning, we are of opinion that those sections were not intended to, do not purport to, and do not as a matter of law relate to, street railways. These constitutional provisions, therefore, do not authorize the court to dissolve the respondent or to cancel any part of its capital stock.

The relator, however, contends that, if it be conceded that the fundamental law does not authorize a judgment of dissolution, yet for other reasons all of the common stock should in this proceeding be canceled. To sustain this assertion the relator argues that, since the aggregate value of the tangible property of the constituent companies does not amount to the sum of the par value of the preferred stock and the bonds of the consolidated corporation, the directors and stockholders of the constituent and the consolidated corporations committed a fraud upon the public by issuing and delivering the common stock in controversy, that it impairs the credit of the consolidated corporation, permits its affairs to be controlled and managed by men whose interest in its welfare is speculative, and will materially interfere with the proper maintenance and extension of street car service and legitimate rate reductions.

We do not question the right of a court in a proper action to cancel corporate stock issued and delivered

without consideration, or in some instances under such circumstances as to perpetrate a fraud, and this is particularly true of quasi-public corporations, vested by law with power to be exercised for the public welfare, as well as for the stockholders' profit. The law condemns such *ultra vires* acts of those corporations as will seriously impair their ability to properly discharge their public duties. *McCarter v. Pitman, Glassboro & Clayton Gas Co.*, 74 N. J. Eq. 255. But in a proceeding to cancel such watered stock, if the court's judgment is not controlled by statute, the proofs relied on to establish the illegality of the stock should be clear to justify a cancellation, and the fact that property exchanged for stock is not worth in the market the par value of that stock will not ordinarily sustain a finding of fraud. In the instant case the relator's evidence tends to prove that the value of these properties did not in February, 1909, exceed \$2,000,000 in value, while the respondent's evidence tended to prove that the properties, tangible and intangible, were then worth \$3,300,000. *Memphis & L. R. Co., v. Dow*, 120 U. S. 287; *Sioux City, O. & W. R. Co. v. Manhattan Trust Co.*, 92 Fed. 428; *Wells v. Northern Trust Co.*, 195 Ill. 288, 296. If we accept the state's proof, there is no such discrepancy in values as to justify a judgment canceling the stock. But however this may be, the statute under which the consolidation is said to have been consummated does not in direct language or by fair intendment provide that the stock and bond issue of the consolidated corporation shall not exceed the combined issues of the constituent corporations, nor that the property of the consolidated corporation shall equal in value the par value of its stock and bond issue. This statute invites rather than restricts the inflation of stocks and bonds. If the consolidation was consummated, a new corporation was created. *Ohio & M. R. Co. v. People*, 123 Ill. 467. Should the common stock of the new corporation be canceled, it would be impossible to place the stockholders of the constituent companies in

their former position, because the older corporations for most purposes ceased to exist with the creation of the new corporation, and the agreement between the stockholders would be partially annulled. The owners of the common stock in the constituent companies were willing to exchange it for the stock of the consolidated corporation upon the terms agreed to. Is it within the province of the court to say that they shall trade on other terms? Connected with the contract to exchange was an agreement to permit the holders of preferred stock to barter their holdings for the consolidated corporation's bonds. Would the owners of the common stock of the constituent corporations have been willing to permit that substitution had they known that the terms of the agreement with respect to their stock could not be enforced and would not be respected? It is evident that the court cannot by any process of scaling down the common stock place the holders in the position they occupied before the consolidation. So far as the respondent's ability to serve the public, it owns all of the property devoted by its predecessors to that purpose, and has expended over \$200,000 in improving its power plant and in extending its railway, and it is within the power of the railway commission to compel such additional expenditures as may be necessary to afford the public the service it is entitled to from the respondent, and its earnings are ample to pay for such improvements.

Nor will the valuation by implication fixed by the promoters of the consolidation concerning the value of the property of the constituent corporations and of their stocks and bonds bind the railway commission in determining in a proper case the investment upon which the respondent's stockholders should receive a return in the way of dividends, or the exact amount of the charges that may be exacted for transporting passengers. *Smyth v. Ames*, 169 U. S. 466; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 757; *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U. S. 578. We

therefore conclude that the relator has not made out a case justifying the court in these proceedings to direct the cancelation of the common stock.

This brings us to the relator's final contention that the respondent should be ousted from the privileges of distributing and selling electric current for illumination and power purposes, and distributing and selling heat to private consumers. The respondent suggests that, inasmuch as the articles of incorporation of the Citizens' Railway Company are not in evidence, we should presume that they authorize the exercise of those privileges. But the burden was not on the state to produce this proof.

Where an information in *quo warranto* presented by the law officer of the county or of the state charges the respondent with the unlawful exercise of corporate franchises, the answer should be either a disclaimer or a justification. In the latter event, the facts to exonerate the respondent should be pleaded. 32 Cyc. 1455; *State v. Tillma*, 32 Neb. 789. And if the information does not disclose that the state is demanding a forfeiture of franchises at one time legal, the burden is on the respondent. *State v. Davis*, 64 Neb. 499; 17 Ency. Pl. & Pr. 481.

The respondent answered that its remote assignor, the Lincoln Electric Railway Company, acquired light and power franchises, that in 1900 the city of Lincoln granted the earlier traction company franchises for those purposes, and in 1906, when the judgment in *State v. Lincoln Street R. Co.*, 80 Neb., 333, was rendered, the respondent therein had been for several years exercising those franchises. It is contended that the respondent is not acting *ultra vires* in the matters complained of, that the judgment in *State v. Lincoln Street R. Co.* is a bar to this action, not only because of the things adjudged, but that to hold otherwise will permit the state to split its cause of action, and that by inaction the state is estopped to maintain this branch of its case. None of the ordinances or charters pleaded are in evidence. If they were, an interesting question as

to the power of a street railway to accept and enjoy a heating, power or lighting franchise would be presented. The prayer of the information is for a dissolution of the respondent, or, if that relief be not granted, that its common stock and bond issue be canceled, "and for such other relief as the court may find necessary to render effectual its said judgment." Whether the relief contended for in the argument should be granted under this prayer is not discussed in the briefs, and will not be determined. The district judge filed a written opinion giving his reasons for the judgment, and no mention is made of the heat, lighting or power franchise, but his discussion relates solely to dissolving the respondent. In the journal entry, however, the finding is general in the respondent's favor, and the information is dismissed without reservation, so that it is probable, as a matter of law, that the judgment confirms the respondent in the right to exercise those franchises. The discussion of this subject is not satisfactory, and we prefer not to dispose of the law question in this state of the record. There is some evidence tending to prove that the heating plant was constructed by a distinct corporation, and that all of its stock is owned by the Lincoln Traction Company. But a few words of general argument are found in the briefs with respect to this branch of the case.

In *Nebraska Shirt Co. v. Horton*, 3 Neb. (Unof.) 888, we held that, unless authorized by statute, a corporation has no power to subscribe to the capital stock of another corporation. And the rule is applied to a banking corporation in *Bank of Commerce v. Hart*, 37 Neb. 197. Section 9, art. VII, ch. 72, Comp. St. 1907, authorizes street railway companies to subscribe to the stock of another street railway company whose lines of railway connect with those of the subscribing company, but we have not been cited to any statute authorizing street railway corporations to subscribe to the stock of corporations organized for the purpose of transacting any business other than a street railway. We find no reference in either brief to the law on this branch of the case.

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As we understand the record, the respondent failed to sustain the burden of establishing its right to exercise heat, light or power franchises, and to this extent the judgment is not sustained by sufficient evidence. The respondent pleads the judgment in *State v. Lincoln Street R. Co.*, 80 Neb. 333, in bar, but an inspection of the record in that case (which we find in the bill of exceptions) discloses that the sole franchise there challenged was the right of the respondent to exist, or to operate a street railway in the city of Lincoln. No mention is made in the pleadings or judgment to light, power or heat franchises. The testimony to support the respondent's right to exercise the franchise of a street railway is not necessary to sustain the other, so not only was there no adjudication of the subject matter of the instant case, but there was no splitting of causes of action. 23 Cyc. 439; *State of Maine v. United States*, 36 Ct. Cl. 531.

Nor are we willing, in the state of this record, to say that the state is estopped by its laches from prosecuting these parts of its complaint. We think these issues should not be determined by us in the state of the record. Some other matters, we deem immaterial to the merits of the case, are referred to in the answer and in the briefs, but we do not believe we are justified in extending this opinion by further reference thereto.

The judgment of the district court is affirmed, in so far as it refuses to dissolve the respondent, or to cancel its bonds or common stock, but, as to all other issues joined by the pleadings, the judgment is reversed and the cause remanded; each party to pay its own costs in this court.

JUDGMENT ACCORDINGLY.

REESE, C. J., not sitting.

PRUDENTIAL REAL ESTATE COMPANY, APPELLANT, v.
CHARLES BATTELLE, TRUSTEE, ET AL., APPELLEES.

FILED JANUARY 3, 1912. No. 17,303.

1. **Taxation: FORECLOSURE OF LIEN: SALE: REFUSAL OF CONFIRMATION.**

It is competent for the district court to refuse to confirm a sale made in a state tax suit, in case the purchaser, during the period premium bids may be made, and in order to coerce the owner of the equity of redemption to purchase the certificate at a premium, threatens that, should a premium bid be made, he, the tax purchaser, will overbid that offer irrespective of the value of the property, and by repeated declarations pursues a course tending to intimidate other investors from raising his bid.

2. ———: ———: ———: ———: **REPAYMENT OF BID.** In such a case where there is no proof of wrong-doing prior to the payment of the bid made at the sale, the court should not forfeit the purchaser's money or money paid by him for subsequent taxes, but should make such equitable orders as may be necessary to insure a return to the purchaser of his money.

APPEAL from the district court for Douglas county:
ALEXANDER C. TROUP, JUDGE. *Affirmed in part and reversed in part.*

D. C. Patterson, for appellant.

Alfred G. Ellick, James P. English, John A. Rine, W. C. Lambert and Clinton Brome, contra.

ROOT, J.

This is an appeal from an order made in the state tax suit for 1904, in Douglas county, refusing to confirm, but vacating, a sale, ordering a resale, and forfeiting the purchaser's bid and money paid for subsequent taxes.

In 1905 the real estate described in the transcript was purchased for \$50 by D. C. Patterson at a sale conducted in the state tax suit. Subsequently the certificate was assigned to the Prudential Real Estate Company. The taxes with interest at that time amounted to \$404.06 and the lot was probably worth a little less. There is a direct

conflict in the testimony concerning the subsequent conduct of Mr. Patterson, but since the witnesses appeared before the district court, we are inclined to accept its version of the transaction. Taking that view of the case, we find that within 12 months after the sale Mr. Patterson in conversations with Mr. Battelle, the owner of the real estate, said that, if the Patterson bid was raised, he (Patterson), without regard to the value of the property, would bid a greater sum, and that Battelle therefore had but one of two courses to pursue, i. e., redeem by paying the face of the decree with interest and costs, or purchase the Patterson certificate, which was offered for about \$225. Mr. Patterson purchased many tracts of land at this sale, and subsequently transmitted to the owners of the equity of redemption statements advising them of the amount of the decree, the amount of his bid, and offering to sell the certificate for one-half the difference between the sum of the taxes and his bid. These letters inform the reader that the law gives the tax purchaser the last opportunity to bid, that Mr. Patterson acted in the interest of a third person in making the purchase, and closed with the statement, "My orders are to raise all premium bids, but offer to sell on the same basis after as before, but add the premium and costs of serving notices and later taxes paid."

The statute under which these proceedings were prosecuted (laws 1903, ch. 75, Ann. St. 1911, sec. 11144 *et seq.*), among other things, provides in substance that the state tax suit may be instituted against all lots and parcels of land against which there are unpaid and delinquent taxes. The proceedings up to the time of the sale are summary in their nature. The sale is at public vendue and the purchaser is required to forthwith deposit the amount of his bid with the county treasurer. Within 18 months the treasurer is authorized to accept a premium bid for not less than the original bid plus 10 per cent., and 18 per cent. interest on the first bid. The original bidder is given five days subsequent to the 18 months

within which he may increase the highest premium bid by 5 per cent. should he desire to consummate his tax purchase. It will be understood that, with this statute controlling the rights of the parties, an extensive investor in tax certificates could with profit finally bid more than some of the lots he was interested in were worth, in order to compel the owners of other lots to come to his terms and purchase his certificates at a considerable increase over his bid, and yet for less than the aggregate of taxes against their property, in the hope and belief that thereby they would relieve their land from the burden of the unpaid taxes. Under this statute the tax sale in the state tax suit would not actually be closed until 18 months for premium bids expired, if no premium bids were made, or until five days thereafter, if such bids had been made. At the end of two years subsequent to the sale, the holder of the tax certificate, upon notice, may apply to the district court to confirm the sale and order a deed executed. At this time interested persons may interpose their objections.

In the instant case Mr. Battelle objected to the confirmation because of Mr. Patterson's conduct. The county attorney also intervened on behalf of the public and made like objections. No offer had been made to increase the bid, as was done in *Prudential Real Estate Co. v. Hall*, 79 Neb. 805, but the district court was justified in believing that a substantially increased bid would be made at a subsequent sale. While the proceedings in the state tax suit are in some particulars summary, yet section 11151, Ann. St. 1911, provides that, in so far as the procedure is not controlled by the terms of the statute, it "shall be the usual practice of courts of chancery in this state." The sale is conducted by the treasurer and not by the sheriff, but he acts under the authority of the decree of the district court. If, upon confirmation, it is made evident to the court that sharp practice has been indulged to the disadvantage of the public, it has the undoubted right to refuse to confirm the sale, and the authority to make such

orders in the premises as will protect all parties in interest. *Prudential Real Estate Co. v. Hall, supra.*

The appellant contends that, since section 4, art. IX of the constitution, prohibits the commutation or release of taxes lawfully levied, the county treasurer had no authority to accept a premium bid from the owner of the real estate, but that his sole remedies are to redeem from the decree or to purchase the certificate. We do not think it necessary to decide this point. Had the owner bid and paid to the county treasurer the minimum amount of the premium bid, the public would have been that much better off, so that whether the legal effect would have been a payment to that extent of the tax lien or a liquidation of the incumbrance, the public were prejudiced by Mr. Patterson's conduct. We are not inclined to accept his argument that he was only asserting his intention to exercise a right given by the law. Nor does the plea that Mr. Patterson was not authorized by the holder of the certificate to make these representations appear to us as sound. Patterson was acting for his principal and it will not be permitted to accept the benefits and reject the burdens created by his unlawful acts.

While we approve the order of the district court refusing confirmation, setting aside the sale, and ordering the treasurer to again offer the lot for sale, we do not commend the judgment of forfeiture. No irregularities attended the bid, nor the payment of the subsequent taxes assessed. It has ever been the policy of this state to protect a tax purchaser who in good faith has paid to the treasurer money in satisfaction of a tax purchase, although it may subsequently appear that the sale was void. *Pettit v. Black*, 8 Neb. 52; *John v. Connell*, 61 Neb. 267. Ordinarily this is done by subrogating the purchaser to the right of the state. In the instant case, should the tax purchaser be merely subrogated to the rights of the public, he may be compelled to prorate his payments with the amount of the unpaid taxes, and, should the land sell for less than the aggregate of these sums, he will not be pro-

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tected. The amount of the bid is in the possession of the treasurer, but the money paid to satisfy subsequent taxes has been distributed and paid out for the benefit of the public.

The judgment of the district court therefore is affirmed, in so far as it refuses confirmation, sets aside the sale, and orders a resale; but, as to the forfeiture, the judgment is reversed and the cause remanded, with instructions to enter an order directing the county treasurer to pay to the appellant the amount of Mr. Patterson's bid on the land lot in controversy, add to the decree the subsequent taxes paid, and adjudge that the money paid for those subsequent taxes, together with 10 per cent. annual interest thereon, shall be a first lien upon the proceeds of the sale of the premises; the appellant to recover its costs in this court.

JUDGMENT ACCORDINGLY.

**J. K. ARMSBY COMPANY, APPELLANT, V. RAYMOND
BROTHERS-CLARKE COMPANY, APPELLEE.***

FILED JANUARY 3, 1912. No. 16,563.

1. **Sales: REFUSAL TO ACCEPT GOODS: ACTION FOR DAMAGES: CAPACITY TO SUE.** A purchaser who by a valid written contract induced a nonresident corporation, in compliance therewith, to deliver to a carrier for shipment the goods purchased, and attempted without cause to rescind the purchase while the goods were in transit, will not, in an action for damages for refusing to accept the consignment, be heard to assert that plaintiff has not legal capacity to sue.
2. **Corporations: ACTION: PLEADING: NONCOMPLIANCE WITH STATUTE AS DEFENSE.** A defendant who relies for a defense upon the plaintiff's failure to comply with the act (Comp. St. 1907, ch. 16) requiring a nonresident corporation to become a domestic corporation, before transacting business in Nebraska, should plead and prove facts showing noncompliance with such statute.

* Rehearing denied. See opinion, p. 773, *post*.

3. **Sales: RESCISSION: LIABILITY FOR DAMAGES.** After goods have been sold and delivered to a carrier for shipment pursuant to a valid contract in writing, the purchaser, in absence of the seller's consent, cannot rescind the purchase on account of a financial depression alone without incurring liability for resulting damages.
4. ———: ———: **RESALE: DAMAGES RECOVERABLE.** Where an Illinois corporation, having an agency in Omaha, sells dried fruit and delivers it to a carrier in California for shipment to the purchaser at Lincoln, Nebraska, pursuant to a valid written contract and a custom of the parties, the seller may divert the shipment to Omaha, resell the fruit there or in neighboring markets within a reasonable time for the best prices obtainable, and recover from the purchaser proper charges for storage, insurance, and freight, which the latter agreed to pay, and also the difference between the contract prices and the prices for which the goods were resold, if the purchaser without cause attempted to rescind the purchase, while the fruit was in transit in a car-load lot containing goods ordered by other purchasers, and absolutely refused to accept the consignment any place under any circumstances.
5. ———: ———: ———: **UNREASONABLE DELAY.** Whether a resale of goods, purchased by a dealer who refused without cause to accept them, was unreasonably delayed depends upon the facts and circumstances of each particular case.
6. ———: ———: **ACTION FOR DAMAGES: PLEADING: NOTICE OF RESALE.** In a suit by a seller to recover from the purchaser the difference between the contract prices and the prices for which the goods purchased were resold, after the purchaser without cause absolutely refused to accept them, it is unnecessary for plaintiff to allege that defendant had notice of the resales, where the petition contains allegations showing the latter had notice of the facts under which plaintiff's right to make the resales existed.
7. ———: ———: ———: ———: **TENDER.** Where the purchaser of goods delivered to a carrier in California for shipment to Lincoln, Nebraska, absolutely refuses without cause, while the goods are in transit, to accept them anywhere under any circumstances, it is unnecessary for the seller, after diverting them to Omaha for storage and resale, in a suit to recover damages for breach of the contract, to allege and prove that the consignments were tendered to the purchaser at Lincoln, the latter having been repeatedly requested to accept them there.
8. ———: **NONACCEPTANCE: GROUNDS FOR REFUSAL.** Where a purchaser of goods absolutely refused to accept them on the sole ground

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of an unexpected financial depression, other grounds, in absence of fraud, need not be considered in a suit by the purchaser to recover the difference between the contract prices and the prices for which the goods were resold, if they complied with the contract of purchase in kind, quality and quantity.

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Reversed.*

Parish & Martin, T. J. Doyle and G. L. DeLacy, for appellant.

Charles O. Whedon, contra.

ROSE, J.

This is an action to recover damages for defendant's breach of contract to accept and pay for the following items of dried fruit purchased from plaintiff, an Illinois corporation transacting business in California:

100 25-pound boxes extra choice $\frac{1}{2}$ pears at 12 $\frac{1}{2}$ c. a pound.

100 25-pound boxes extra choice apricots at 22c. a pound.

200 50-pound boxes Muir peaches at 10 $\frac{1}{2}$ c. a pound.

30 25-pound boxes extra choice $\frac{1}{2}$ pears, at agreed price of \$93.75.

In the petition the substance of facts pleaded in detail is: Pursuant to contracts executed in writing in October, 1907, plaintiff delivered on board a car at Marysville, California, November 20, 1907, the first three of the items named, defendant to pay freight at car-load rates to Lincoln, Nebraska, the purchaser's place of business. Under a contract dated July 26, 1907, the fourth item was delivered on board a car at Fresno, California, November 18, 1907, defendant to pay freight at car-load rates to Lincoln, Nebraska. Through defendant's failure to accept the fruit according to agreement, plaintiff stored and insured it in Omaha, afterward resold it, and was damaged in the sum of \$648.42, the difference between the

contract price and the amount for which it was resold, charges for freight, storage and insurance being added as elements of damage.

The execution of the contracts of purchase was admitted by an answer, in which defendant alleged that they were negotiated by Gable, Johnson & Jones, agents of plaintiff at Omaha; that through a letter written by defendant November 18, 1907, to plaintiff at San Francisco and through a letter to the agents named, the orders for the Marysville consignments were duly countermanded; that none of such fruit was ever delivered to or received by defendant or was ever in its possession; that the Fresno consignment was never sent to or received by defendant and was never in its possession; that if any fruit was delivered on board of a car at Marysville and consigned to defendant at Lincoln, as alleged in the petition, plaintiff stopped the car in transit and diverted it to Omaha, and the consignment was never received by defendant at Lincoln. Defendant in its answer denied all allegations of the petition not specifically admitted, and the reply was a general denial.

The case was tried to a jury, and at the close of plaintiff's testimony each party requested a peremptory instruction; the motion of defendant being based on the ground that "under the pleadings and proof the plaintiff is not entitled to recover." The motion of defendant was formally sustained and the action dismissed. Plaintiff has appealed.

Plaintiff argues that its petition states a cause of action for damages resulting from defendant's breach of contract to accept the fruit; that each consignment had been taken by the carrier from the shipping place and was in transit before plaintiff received any notice of a purpose on part of defendant to countermand the orders; that there was no cause to rescind the contract of purchase; that the full amount of plaintiff's claim was established by uncontradicted testimony; that there is no evidence to sustain the verdict in favor of defendant; and

that the overruling of plaintiff's motion for a peremptory instruction was erroneous.

Defendant offered no proofs. Plaintiff's evidence tended to show: The goods shipped complied with the contract of purchase in kind, quantity and quality. Before plaintiff received any notice from defendant of its attempt to cancel the contracts of purchase, the fruit ordered had been purchased by plaintiff for shipment, had been packed in a car at the proper shipping place in California, had been billed, and had been turned over to the carrier and had been started on its way to Nebraska. The carrier took the car from the plaintiff's packing-house switch November 20, 1907. In the afternoon, November 21, 1907, plaintiff received from defendant a letter dated at Lincoln, November 18, 1907. It contained a request for the cancelation of the orders for the fruit shipped from Marysville; the reason given by defendant being: "Financial conditions are such here that we cannot handle these goods, and therefore we ask you to cancel our orders as we cannot take the goods." Defendant was advised that the fruit had been shipped and that the sale could not be rescinded. Afterward, while the fruit was in transit, defendant wrote to plaintiff as follows: "Lincoln, Neb., Nov. 23, 1907. The J. K. Armsby Co., San Francisco, Calif. Gentlemen: Gabel, Johnson & Jones of Omaha sent us your letter and telegram stating you could not cancel our order for dried fruits. We notify you that we will not accept the goods. We countermanded the order and will not take the goods under any circumstances. This is positive. We gave you the proper reasons for countermanding the order and we can not take the goods, and ask you to make disposition of same. The cancelation was sent to you in ample time and we ask you to act accordingly. Yours truly, Raymond Bros.-Clarke Co. By I. M. Raymond."

The only reasons offered by defendant for attempting to cancel the order were financial conditions and inability to pay for the fruit. There was no intimation of fraud on

the part of plaintiff. After repeated attempts to persuade defendant to accept the consignments, and after the latter had positively refused to do so under any circumstances, they were diverted to Omaha, where plaintiff had an agency. Later the fruit was resold for the best prices obtainable. The proof shows the original prices, the sums realized from resales, the amount of freight charges which defendant agreed to pay, and the cost of storage and insurance.

To justify the judgment of dismissal, defendant insists that the record shows plaintiff has no legal capacity to sue. This point is based on the following propositions: The petition alleges that plaintiff is an Illinois corporation. Incorporation is denied by the answer. Plaintiff has not complied with the law permitting non-resident corporations to transact business in this state. To the introduction of testimony defendant interposed a demurrer *ore tenus*. The peremptory instruction for defendant, however, cannot be sustained on this ground. Defendant admitted that it entered into the contracts of purchase, and in the answer containing the admission their validity is not questioned. Through these contracts plaintiff was induced to buy, sell to defendant, and ship the fruit. Under such circumstances defendant will not be heard to question plaintiff's legal capacity to sue. *Union Pacific Lodge v. Bankers Surety Co.*, 79 Neb. 801.

It is further argued that plaintiff, being a foreign corporation, was not entitled to a recovery without becoming a domestic corporation by filing its articles of association with the secretary of state, and by complying with other statutory provisions before transacting business in Nebraska. Comp. St. 1907, ch. 16. In this respect there is nothing in the record to show that plaintiff had not complied with the statute cited. Noncompliance is a defense which, to be available, must be pleaded. No such plea having been made by defendant, it will be presumed that plaintiff complied with the law. *Northern Assurance Co. v. Borgelt*, 67 Neb. 282. It follows that the judgment cannot be upheld on this ground.

Defendant insists it had a right to cancel the contracts and exercised that right November 18, 1907, before the goods were delivered to the carrier. The foundation for this assertion is a letter written by defendant to, and received by, plaintiff's Omaha agents November 18, 1907. The argument is that notice to the agents is notice to the principal. The letter contained the statement that defendant had written to plaintiff to cancel the Marysville orders, and asking the agents to write to their principal and request it not to ship the goods. The proofs show that the agents promptly wrote the requested letter, which was not received by plaintiff until the afternoon of November 21, 1907, after the goods had been shipped. This does not amount to a rescission relieving the purchaser from its agreement to accept the fruit purchased or for the consequences of violating its contract.

Among other propositions advanced by defendant are these: Had a cause of action been stated, the measure of damages would have been the difference between the contract prices at Marysville November 18, 1907, when the fruit was delivered to the carrier, and the market prices at that place, where the contract was broken. The market price at the time and place mentioned is not pleaded and there is no proof of such prices anywhere. Plaintiff does not allege that it gave notice of the resales. They were made at Omaha, Hastings, Grand Island, Kansas City and Atchison, six months after the alleged breach of contract. Proof of such resales and of the prices realized was improperly admitted. If plaintiff had a right to make such resales, they should have been made at the time and place where the breach occurred. Since the measure of recovery is not pleaded or proved there can be no recovery.

In the present case there are reasons why plaintiff's rights should not be determined according to such views. The proofs show that, pursuant to a custom between the parties, the fruit was shipped in a car containing other goods. Under this custom defendant obtained the benefit of freight charges at car-load rates from the place of

shipment to Lincoln. The shipment was made in the usual course of business. Notice of defendant's purpose to countermand the orders was received while the fruit was in transit. No valid ground for rescinding the contract of purchase was given. Under such circumstances plaintiff was neither required by law nor morals to interfere with the consignments to other customers, nor to require the carrier to return to the place of shipment the goods purchased by defendant, because it broke its contract there. During the time the goods were in transit plaintiff tried to persuade the purchaser to keep its bargain. If a breach originally occurred at Marysville, defendant was nevertheless under obligation to accept the goods at Lincoln, and the absolute refusal to do so was also a violation of the contract. Defendant having arbitrarily refused to accept the goods anywhere, it became the duty of plaintiff to take charge of them for the purpose of lessening the purchaser's damages. Plaintiff was engaged in the business of selling dried fruit, and under the circumstances of this case the consignments were properly diverted to Omaha for storage and resale, there being a storage house and an agency at that place. In failing to allege notice of the resales the petition was not demurrable. It showed the absolute refusal of the purchaser to comply with the contract of sale. It also contained allegations showing that defendant had notice of facts under which plaintiff's right to make the resales existed. Plaintiff was not required to allege notice under the circumstances disclosed. *Ingram v. Matthien*, 3 Mo. 209; *Rosenbaums v. Weeden, Johnson & Co.*, 18 Grat. (Va.) 785; *Waples & Co. v. Overaker & Co.*, 77 Tex. 7; *Lindon v. Eldred*, 49 Wis. 305; *Clore v. Robinson*, 100 Ky. 402. If the goods were not resold in either Lincoln or Omaha, the proof shows without contradiction that they were resold in neighboring markets for the best prices obtainable. This was sufficient evidence of the market value to make, in that respect, a *prima facie* case. *Ingram v. Wackernagel*, 83 Ia. 82; *Waples & Co. v. Overaker & Co.*,

77 Tex. 7; *Rickey v. Tenbroeck*, 63 Mo. 563; *Gehl v. Milwaukee Produce Co.*, 116 Wis. 263; *Moody v. McTaggart*, 29 Pa. Super. Ct. 465; *Lewis v. Greider*, 49 Barb. (N. Y.) 606; *Anderson v. Frank*, 45 Mo. App. 482. Whether a resale is unreasonably delayed depends upon the facts and circumstances of each case. *Almy v. Simonson*, 52 Hun (N. Y.) 535; *Lewis v. Greider*, 49 Barb. (N. Y.) 606; *T. B. Scott Lumber Co. v. Hafner-Lothman Mfg. Co.*, 91 Wis. 667. In determining whether there was an unreasonable delay in reselling the goods, and whether plaintiff should recover the expense of storage and insurance as elements of damage, it was proper for the trial court to take into consideration judicial knowledge that there was a general depression in business after the goods were delivered to the carrier at the time disclosed by the proofs, and the fact that financial conditions arising unexpectedly after the goods were purchased led to defendant's attempt to countermand the orders. It was proper also to inquire whether a careful dealer would make a hasty sale during such a period, and whether conditions justified the expense of storage and insurance. Without regard to such expenses, the payment of freight charges, which defendant agreed to pay, was a direct and natural result of his breach of contract, and such charges are recoverable as damages. For the mere idle purpose of being able to prove that the goods had been tendered to defendant at Lincoln, plaintiff was not required to incur the additional expense of shipping them to that place, since defendant had refused absolutely to accept them in any event. The freight charges to both places were the same. *Lex neminem cogit ad vana seu inutilia peragenda.*

Failure of plaintiff to deliver the goods to the carrier according to the terms of the contract is another reason urged by defendant to justify the peremptory instruction in its favor. This position is also untenable. As already shown, plaintiff is seeking to recover damages for defendant's breach of contract to accept the fruit purchased. The only reason offered by defendant for attempting to

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cancel the order was the condition of the money market and inability to pay the purchase price. Rejection of the goods on other grounds need not therefore be considered. *Ginn v. W. C. Clark Coal Co.*, 143 Mich. 84; *Littlejohn v. Shaw*, 159 N. Y. 188.

The petition states a cause of action. Plaintiff's proofs are not contradicted. Both parties, by requesting a peremptory instruction, invited the judgment of the court on the issues and facts. The judgment should have been in favor of plaintiff, and must for that reason be reversed. In the further proceedings, however, the trial court should not retry the case or retrace its steps beyond the point where the error in directing a verdict in favor of defendant was committed, but should render judgment in favor of plaintiff for the damages proved.

REVERSED.

E. S. JOSEPHINE TAYLOR, APPELLEE, v. W. E. HARVEY ET AL., APPELLANTS.

FILED JANUARY 3, 1912. No. 16,849.

1. **Taxation: LIEN OF GENERAL TAXES.** Under the revenue laws of Nebraska, general taxes on real estate do not become a lien thereon until October 1st of the year in which they are levied. Comp. St. 1907, ch. 77, art. I, sec. 14.
2. **Deeds: COVENANTS AGAINST INCUMBRANCES: BREACH: TAXES.** In a warranty deed a covenant against incumbrances is not broken by grantor's nonpayment of taxes which do not become a lien on the land conveyed until after the deed is executed and delivered.

APPEAL from the district court for Scott's Bluff county:
HANSON M. GRIMES, JUDGE. *Affirmed.*

William Morrow, for appellants.

L. L. Raymond, James E. Philpott and R. C. Hunter.
contra.

ROSE, J.

Foreclosure of a purchase-money mortgage on a tract of land in Scott's Bluff county is the relief sought by plaintiff. The trial court rendered a decree in her favor, and defendants have appealed.

September 14, 1908, A. O. Taylor, by warranty deed in which his wife, E. S. Josephine Taylor, joined for the purpose of relinquishing her dower rights, conveyed the land to W. E. Harvey. The latter and his wife, Cora E. Harvey, are mortgagors, and A. O. Taylor is mortgagee. The mortgage was dated September 14, 1908, and was given to secure a 9,000-dollar note due March 1, 1916, and interest. The same day the mortgage was executed, mortgagee assigned it to his wife, plaintiff herein, and mortgagors deeded the land to the Scott's Bluff Irrigated Land Corporation. The mortgagors and their grantee are defendants. The mortgage provides: "If the taxes and assessments of every nature, which are assessed or levied against said premises, are not paid at the time when the same are by law made due and payable, then * * * the whole of said sum shall immediately become due and payable, without notice, at the election of the mortgagee." Under this provision plaintiff, for defendants' nonpayment of taxes which became a lien on the land October 1, 1908, declared the entire debt to be due and commenced this suit August 31, 1909. The warranty deed executed by plaintiff and her husband contained these words: "We do hereby covenant with the said W. E. Harvey, and with his heirs and assigns, that we are lawfully seized of said premises, and that they are free from incumbrances."

1. In arguing the first assignment of error, defendants assert: The taxes in controversy were assessed and levied and were an incumbrance on the land before plaintiff executed the deed September 14, 1908. Nonpayment thereof was a breach of her covenant against incumbrances. Having herself failed to pay the taxes, she is

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not entitled to a foreclosure of her mortgage on account of defendants' failure to pay them. This view of the law cannot be adopted. Though general taxes on real estate are assessed and levied before October 1st, they do not become a lien or an incumbrance at an earlier date. The revenue law provides: "Taxes on real property shall be a first lien thereon from and including the first day of October of the year in which they are levied until the same are paid." Comp. St. 1907, ch. 77, art. I, sec. 14. The lien of taxes is a creation of the legislature. It attaches only at the time provided by statute. The parties made their contracts with reference to the existing laws. When plaintiff executed her warranty deed September 14, 1908, the general taxes for that year had not become a lien. At that time the land was free from the incumbrance of the general taxes for 1908, for the reason that the legislature fixed a later date for making them a lien. Her covenant, therefore, was not broken by her failure to pay them. On the other hand, mortgagors agreed to pay taxes and assessments of every nature when due and payable, on peril of subjecting the mortgage to foreclosure. The general taxes due and payable October 1, 1908, were not paid until after plaintiff sued defendants. In exercising her right to declare the entire debt to be due, therefore, she was within the terms of her contract.

2. Another defense urged is that the county treasurer would not accept the taxes on the mortgaged land without payment also of unpaid taxes on adjoining lands, which plaintiff herself was under obligation to pay. The evidence does not sustain this defense. It is shown without contradiction that taxes levied alone on at least a portion of the mortgaged land, and which became a lien October 1, 1908, were due and unpaid when plaintiff exercised her right to declare the entire debt to be due. For the reason no valid defense was established, a decree of foreclosure was properly rendered.

AFFIRMED.

JOHN G. LOWE, APPELLEE, v. FRANCIS G. KEENS,
APPELLANT.

FILED JANUARY 3, 1912. No. 16,926.

1. **Pleading: INCONSISTENT PLEAS: APPEAL: WAIVER.** Where defendant goes to trial on the issues raised by the pleadings as a whole, without attacking the reply in any form on the ground that it is inconsistent with the petition or that it changes the cause of action, it may be held on appeal that he waived those objections.
2. **Contracts: ACTION ON SUBSCRIPTION: ESTOPPEL.** In a suit on a subscription obligating defendant to pay one-fourth of the cost of the nave of a church edifice, plaintiff, under proper pleadings, may prove facts showing defendant was estopped by subsequent conduct and statements from urging the defense that the entire building, including such nave and the chancel, was constructed at one time, instead of the nave alone, as contemplated by the subscription and the original plans.
3. **Evidence: COST OF CONSTRUCTION OF BUILDING.** The cost of a nave constructed with the chancel and other parts of a church edifice may be shown by builders and contractors who are competent to testify to separate items comprising the total cost of the entire structure and to the proportion and amount attributable to the nave.
4. **Appeal: EXCESSIVE RECOVERY.** In an action at law, excess in the amount of the recovery should be called to the attention of the trial court by the motion for a new trial to make the error available on appeal.

'APPEAL from the district court for Buffalo county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

H. M. Sinclair and W. D. Oldham, for appellant.

J. N. Dryden and E. C. Calkins, contra.

ROSE, J.

This is a suit on a subscription of which the following is a copy: "Kearney, Nebraska, June 7, 1907. I hereby agree to pay one-fourth the cost of the 82 feet of church edifice with tower, voted on April 11, 1907, to be built by

the building committee of St. Luke's Episcopal Church, to John G. Lowe, Treasurer of St. Luke's Episcopal Church Building Fund, for the benefit of St. Luke's Church, Kearney, Nebraska, and for the purpose of erecting upon their present site in the City of Kearney, Nebraska, a permanent church building; said subscription to be paid as follows: One-fourth the amount of each and every builder's estimate when allowed and paid by the finance committee of said church building fund. Francis G. Keens."

Among other things, it is alleged in the petition: There was full compliance on the part of plaintiff with the terms of the contract. The total cost of that part of the church edifice described in the subscription was \$18,907.96. Builders' estimates therefor were allowed and paid prior to April 28, 1909. Defendant made payments as follows: October 12, 1907, \$175; December 4, 1907, \$250. There was a prayer for judgment in the sum of \$4,336.99—the balance due. The signing of the instrument is admitted in the answer, but defendant alleges that it was signed pursuant to subscriptions taken April 11, 1907, at a meeting of the vestry, the minutes of which showed it was moved and carried that "We procure plans for a church of about the following dimensions, viz., 130 ft. long, 48 ft. wide, 48 ft. high, and that we complete at this time a part equal to about 82 ft. in length, with the tower." In the answer it was further alleged, in substance: The rector invited gifts toward the expense of the building, and obtained defendant's pledge with that of twelve others for contributions to be expended upon the 82 feet of church edifice mentioned, commonly called the "nave." Afterward, but before defendant executed the contract, plans for the nave were procured according to the action taken by the vestry. Defendant signed and delivered the contract relying on such plans, and in accordance therewith the foundation was constructed. It was upon the cost of such foundation that defendant made his payments. He left the United States January 1,

1909, and was absent several months, but at the time of his departure no work of construction had been done except upon the foundation. During his absence, and without his knowledge or consent, the plans for the edifice to which he had subscribed were abandoned and others for a building materially different in dimensions, materials and foundation were substituted and used. It was a condition of his obligation that no debt should be incurred, unless funds for the payment thereof were provided, and that the edifice, when completed, should be free from debts or liens. In disregard of this condition the property was mortgaged for \$8,000, and other debts were incurred, but not paid. Though the building committee was instructed to let to the lowest competent bidder a contract for the building of the superstructure of the nave, all bids were fraudulently rejected and the building was constructed by hired labor under direction of a superintendent, thereby making an excessive expense of \$10,000, to which defendant did not agree to contribute. The reply is as follows:

"Now comes the above named plaintiff and, for reply to the answer of the defendant herein filed, says:

"(1) That it is true that defendant's subscription, as set forth in said petition, was made in pursuance of a pledge by him given at the meeting of the vestry of said church held April 11, 1907, the minutes of which are copied in defendant's answer.

"(2) That it is untrue that, before the execution of the defendant's contract set out in plaintiff's petition, plans were procured for the 82 feet constituting the nave of said church, or that such plans, or any plan, was submitted to the defendant as the one according to which said edifice should be erected.

"(3) That in truth and in fact the building committee of said church, which included the defendant, negotiated with an architect, named Guth, to prepare plans, elevations, working drawings, details and specifications for the erection of said church; and after discussing with

the said building committee the general features of the church to be erected, the said architect prepared a plan for the foundation of the nave and chancel of said church, according to which said foundation was constructed; but that he failed, neglected and refused to make and furnish any further plans, elevations, working drawings, details or specifications or any plan whatever for the superstructure of said church; and that no such plans were made until another architect was employed, who made and furnished the plans, other than the foundation, according to which said building was constructed.

“(4) That the said defendant, after such other architect was employed, and knowing that the building committee was proceeding with the erection of said church upon plans furnished by such second architect, when requested to attend the meetings of the building committee of which he was a member, told the other members of such committee that he did not care to attend such meetings, but that they should go on with the construction of said building, and that the money which he had subscribed would be ready for them.

“(5) That it is untrue that the obligation mentioned in said petition was assumed by defendant on condition that there should be no debt contracted in building said edifice unless there were funds provided for the payment thereof.

“(6) That after the commencement of said work, the church received a gift made for the purpose of assisting in the erection of a chancel at the same time with the nave of said church; and that it was thereupon determined to construct the entire church; and that at the time this determination was made the defendant was a member of the building committee, approved the same, and himself let the contract for constructing the foundation of the chancel.

“(7) That it is true that the building committee of said church, after having had and received bids for the construction thereof, employed a superintendent and erected

said church under his direction; but that it is untrue that the cost of said church was in excess of the lowest bid received from any person offering to erect the same by contract.

"(8) The plaintiff further replying to the answer of said defendant denies each and every allegation therein contained not hereinbefore admitted or denied."

The case was tried to the court without a jury, and there was a judgment in favor of plaintiff for \$4,299.25. Defendant has appealed.

The record contains evidence tending to prove: The foundation for the nave and the chancel was constructed under separate contracts according to plans prepared by the architect first consulted, but the building committee was unable to procure from him plans for the superstructure. Another architect was employed for that purpose and prepared the plans used for the superstructure of the entire building, including the nave with tower and the chancel, which were constructed together under his supervision. Different parts of the work were let to different contractors. One-fourth of the cost of the 82 feet of edifice with the tower, as described in the subscription, was shown by estimates of contractors and builders. There was also proof tending to show facts estopping defendant from asserting nonliability on account of changes and of the construction of all instead of a part of the church edifice.

It is first argued that the judgment should be reversed because the allegations of the petition are not sustained by the evidence. In an abbreviated form some of the propositions discussed by defendant under this head are: Plaintiff was only entitled to recover, if at all, upon the contract pleaded in the petition, and there is no evidence that the building committee complied therewith. It was not shown that the nave with tower—the part of the building to which defendant's subscription applied—was built according to the terms of the contract. On the contrary, the proofs show that a church 132 feet long, includ-

ing the nave with tower and the chancel, was constructed at one time as one building. While defendant subscribed to part of a church, to be completed according to the terms of his agreement, "at this time," the proofs show that an entire church to which defendant did not subscribe was built at one time. Defendant relies on the terms of his contract and insists that it must be strictly construed. To sustain the position thus taken, he insists that the reply is inconsistent with the petition and contains an attempt to change the cause of action on the written contract, in violation of the rules of pleading, and that consequently incompetent evidence in support of the reply does not establish defendant's liability on his contract. Without attacking the reply by motion or otherwise, defendant went to trial on the issues raised by the pleadings as a whole. While the pleadings were in that condition both parties adduced their proofs. Defendant had abundant opportunity to meet the case made by plaintiff, and it will be held on appeal that he waived the objections he now makes. *Miner v. Morgan*, 83 Neb. 400.

It is further contended that it was the purpose of the vestry, as shown by the minutes of its meeting April 11, 1907, to first erect the nave and tower; that defendant gave his subscription with that understanding, and that the erection of the entire building at one time under one plan of construction, including the separate part to which alone he agreed to contribute, was a departure from the contract, which released him from liability. It is apparent from the subscription, from the minutes and from other evidence that the vestry did not limit itself to any particular time for the construction of the chancel. The testimony indicates that, after defendant entered into his obligation, an incident arose which encouraged the vestry to undertake the building of the entire edifice at one time. To the construction of the chancel alone the sum of \$5,000 was contributed from an unexpected source. There was nothing in the terms of defendant's subscrip-

tion to prevent the immediate use of this fund or the completion of the chancel. At the time it was received defendant was a member of the building committee, and as such participated in the making of a contract to enlarge the foundation to an extent sufficient for the chancel. A portion of the new fund, with defendant's knowledge and consent, was used for that purpose and the balance was reserved for the superstructure. Defendant, himself, therefore, was a participant in the change which extended the building operations beyond the nave and tower to which his subscription applied. That this was consistent with defendant's subscription was evidently the interpretation of both parties. In addition to defendant's contract, it is proper to look into his subsequent conduct to see if he is estopped to deny liability on account of the departure from the original plans. The purpose to ultimately build the chancel as well as the nave was clearly shown. In common with others defendant was active in a concerted effort to build the church edifice. The proof shows that he obtained a large part of the subscriptions. He was present at a meeting of the vestry when the subscription for \$5,000 was appropriated exclusively to the construction of the chancel, and was an active member of the building committee when the foundation for the entire structure was built. Though he afterward declined to act with that committee, and made a trip around the world, he allowed the work to progress under the directions of his associates without making any protest or denying liability under his contract. There is also direct testimony that he said to one of the members of the building committee: "You can go ahead and build the church and get the plans. I don't want anything more to do with it. You are welcome to my money, but I don't want anything more to do with it." The evidence as a whole fully justified a finding by the trial court that defendant estopped himself by his conduct from making the defense that the dimensions, plans, and the time for construct-

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ing the chancel had been changed. The doctrine of estoppel applies to subscriptions, and this is a proper case for its application. *Petty v. Trustees of Church of Christ*, 95 Ind. 278; *McCleary v. Chipman*, 32 Ind. App. 489; *Booker, Ex parte*, 18 Ark. 338; *Hall v. Thayer*, 53 Mass. 130.

The manner in which plaintiff was permitted to prove "the cost of the 82 feet of church edifice with tower" is also challenged as erroneous. The trial court admitted testimony of builders and contractors to show the cost of the separate items comprising the total cost of the entire structure and to show the proportion and amount attributable to that part of the building, one-fourth of the cost of which defendant agreed to pay. It has already been held that defendant is liable on his subscription. The amount of such liability could only be ascertained by some method of estimating the cost of the nave with tower, since that part of the edifice was not separately constructed. There is proof tending to show that a separate construction of the nave as contemplated by defendant would have cost more than the amount estimated by plaintiff's witnesses. The method approved by the trial court in estimating the cost of construction is one frequently employed, and seems, under the circumstances, to be fair and proper, and one of which defendant has no just ground to complain. *Lambert v. Sanford*, 55 Conn. 437.

It is also insisted that in any event the recovery was excessive, but this question was not presented to the trial court by the motion for a new trial, and for that reason will not be considered on its merits here. *Hammond v. Edwards*, 56 Neb. 631.

No valid defense was established, and no prejudicial error has been found in the record.

AFFIRMED.

LONZO D. WHITFORD, GUARDIAN, APPELLANT, v. HENRY
KINZEL ET AL., APPELLEES.

FILED JANUARY 3, 1912. No. 16,574.

1. **Domicile: CHANGE OF DOMICILE.** Where a wife, of sufficient mind to understand the nature and import of her act, in 1886 voluntarily leaves her home in this state, the title to which is in her husband, and returns to her kindred and former home in Indiana, and shortly thereafter the husband also permanently removes to such state, and both there reside, either together or separate and apart, this will amount to a change of residence of both, although five or six months after such removal the wife is adjudged insane and committed to a hospital for the insane; and the home of both, at the time of such commitment, would be in Indiana.
2. **Homestead: ABANDONMENT: CONVEYANCE.** And in such a case where the evidence is sufficient to show that at the time of their departure from this state neither had any intention of returning thereto, and that at said time the wife had no intention of ever again asserting her homestead rights in and to her home here, held an abandonment by her of her home and of her homestead rights in the land which constituted the same, and that the husband thereafter may convey the same by his individual deed.

APPEAL from the district court for Cuming county:
GUY T. GRAVES, JUDGE. *Affirmed.*

William V. Allen, William L. Dowling and F. D. Hunker, for appellant.

A. R. Oleson, contra.

FAWCETT, J.

The controversy in this case is over the east half of the northwest quarter of section 5, township 23, range 5, in Cuming county. David C. and Frances E. Browand were husband and wife. In 1878 they settled upon the west half of the quarter section above described, and resided upon the same until 1885 or 1886. In 1882 David purchased the 80 acres in controversy, and from that

time until 1885 or 1886 both eighties were used by him in the support of his family. The major portion of the cultivated land was upon his eighty, the buildings and improvements all being upon the west eighty, which at the time they settled upon it was, and at all times since has been, the property of Mrs. Browand. One of the contentions is that, when David purchased the east eighty and brought it into servitude in the support of his family, it thereby became a part of the homestead and thereafter the homestead right attached to both eighties. In 1885, or the spring of 1886, Mrs. Browand left Nebraska and returned to the former home of both herself and husband in Noble county, Indiana, where on October 18, 1886, she was adjudged insane and a few days later was committed to the hospital for the insane at Indianapolis, Indiana. On October 21, 1891, plaintiff was by the Indiana court appointed guardian of her person and estate, and on March 6, 1909, ancillary letters of guardianship were issued to him by the county court of Cuming county, this state. On May 7, 1906, Mr. Browand conveyed the land in controversy to defendant Kinzel. In July, 1906, Kinzel and his wife conveyed a part thereof to defendant Emley, and on the same day Kinzel and wife and Emley and wife conveyed to defendant Gordon. This suit was instituted to set aside the three deeds above set out, to quiet the title in Mrs. Browand, to award plaintiff possession of the land, and for an accounting of the rents and profits. The trial resulted in findings and a decree adverse to plaintiff and quieting the title to the land in defendant Gordon. Plaintiff appeals.

The main questions argued are: (1) Did the land in controversy, purchased by the husband several years after the homestead had been established upon the west eighty, become a part of the homestead, and thereby foreclose the husband of the right to subsequently sell and convey the land without his wife's joining in the deed? (2) Did Mrs. Browand, at the time she left Ne-

braska in 1885 or 1886 for Indiana, take her departure with the intention of never returning to Nebraska, and thereby abandon her home in this state and her homestead rights in and to the land in suit? As the conclusion we have reached upon the second point is decisive of the case, we do not deem it necessary to consider the first. No good purpose would be subserved by setting out the evidence at large in this opinion. An examination of it shows that, while Mrs. Browand, as early as 1885, manifested some peculiarities, she was fully competent to take care of herself, and was not in any manner restrained of her liberty by her husband; that when she departed for Indiana she made the trip alone, visiting with a married sister in this state the night before her departure. Upon returning to Indiana she made her home with her people. Some time later Mr. Browand returned to Indiana and made his home with his people, in the same community where Mrs. Browand was then residing. Neither ever again resided in Nebraska. They continued to live in this manner, separate and apart, until she was admitted to the insane hospital. The fact that he did not go to her nor she to him, and that they seemed to have had no communication one with the other during that period of time, indicates quite strongly that they had separated as husband and wife at the time Mrs. Browand left Nebraska, and that they had both left their home here with no intention of ever again returning thereto. The evidence is insufficient to show that at the time Mrs. Browand left Nebraska she was insane, or that her mind was so unsound or unbalanced that she was not competent to understand the nature and import of what she was doing; but it is sufficient to show that she voluntarily left her husband and abandoned her home and any right of homestead that she may have had in the lands in suit, with no intention of ever returning or of ever again asserting those rights.

The judgment of the district court is therefore

AFFIRMED.

MARTIN HOLMVIG, APPELLEE, v. DAKOTA COUNTY,
APPELLANT.

FILED JANUARY 3, 1912. No. 16,590.

1. **Drains: COUNTY COMMISSIONERS: EMPLOYMENT OF ENGINEER.** When a board of county commissioners, in establishing a drainage ditch, by resolution duly entered upon its journal, employs an engineer, as authorized by section 5506, Ann. St. 1903, and it appears that by oral direction of individual members of the board such engineer had, with the knowledge of all of the members of the board, already performed a part of the work necessary under his general employment, and that the county will receive the benefit thereof, *held* that the official employment by the board will relate back to the time of the beginning of the work under such oral direction, and will entitle the engineer to reasonable compensation for such work.
2. ———: ———: **POWERS.** Paragraph 2 of the syllabus in *State v. Ross*, 82 Neb. 414, reaffirmed.
3. ———: ———: **LIABILITY FOR SERVICES OF ENGINEER.** Where a county board, after having established a ditch and employed an engineer to survey and report upon the same, under the provisions of sections 5500, 5506, Ann. St. 1903, subsequently rescinds its action establishing such ditch, but fails to notify the engineer of its subsequent action, such engineer will be entitled to reasonable compensation for services and expenses subsequently and in good faith performed and incurred by him in the line of his employment.
4. **Appeal: CONFLICTING EVIDENCE.** In a law action, where the evidence upon any disputed question of fact is sufficient to sustain a finding either way, the finding of the trial court thereon will be sustained on appeal.

APPEAL from the district court for Dakota county:
GUY T. GRAVES, JUDGE. *Affirmed.*

J. J. McAllister, for appellant.

P. A. Sawyer, *contra.*

FAWCETT, J.

This is an action to recover for services and expenses

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as engineer for defendant, in the survey, location and establishment of a drainage improvement in Dakota county. Upon a trial to the court without the intervention of a jury, there was a judgment for plaintiff for the amount of his claim, and defendant appeals.

One contention made by defendant is that it was not liable in any event for the services performed by plaintiff, but that he must look to the petitioners for the ditch improvement for his pay. This point has been decided adversely to defendant's contention. *State v. Ross*, 82 Neb. 414.

That the board of commissioners had authority to act is clear. Section 5500, Ann. St. 1903. That it had authority to employ plaintiff as its engineer is also clear. Section 5506. That plaintiff performed the services embraced within the itemized claim introduced in evidence is not disputed; but it is urged that a portion of the service was performed and expenses incurred prior to his employment and appointment by the board, and a portion after the board had rescinded its former action and denied the prayer of the petitioners for the ditch. The record of the proceedings of the board of commissioners shows that plaintiff was formally appointed as engineer December 9, 1905. Items aggregating \$66.15 are for services and expenses prior to that date. Plaintiff testifies that such services were rendered and expenses incurred at the oral instance and request of two of the commissioners. It also appears that the other commissioner knew that plaintiff was acting under such oral employment, and it was known by all the members of the board at the time of the appointment of plaintiff, on December 9, that the services already performed would be used by him as a part of his general employment and be included in his report, and that the board would thereby obtain the benefit of the services already rendered. Such being the case, we think his official employment, December 9, should be held to relate back to May 5, the date of his oral employment and commencement

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of his work. It follows that defendant's contention that individual commissioners could not, under the circumstances in this case, orally bind the county cannot be sustained.

On March 2, 1907, the resolution adopted in 1905, establishing the ditch, was rescinded by the board of commissioners, and upon a reconsideration of the case at that time the prayer of the petitioners for the ditch was denied. It is conceded that no official notice of this action by the board was ever given plaintiff. The county clerk testifies that about a week or ten days subsequent to such action he read the resolution, adopted by the board, to plaintiff. This, plaintiff positively denies. The evidence upon this point being, therefore, squarely conflicting, and this being an action at law, we cannot disturb the finding and judgment of the trial court. If plaintiff was not notified of the abrogation by the board of its resolution of 1905, under which he was working, the court did not err in allowing his claim for services and expenses subsequent to the date of such abrogation.

AFFIRMED.

MARY M. GOFF, APPELLEE, v. SUPREME LODGE ROYAL ACHATES, APPELLANT; SARAH E. LIPPS, INTERVENER, APPELLANT.

FILED JANUARY 3, 1912. No. 16,717.

1. **Insurance: CONSTRUCTION OF POLICY: STATEMENTS IN APPLICATION.** In construing a contract of insurance in a fraternal beneficiary association, for the purpose of determining whether the statements made in the written application therefor were intended to be representations or warranties, the court will take into consideration the situation of the parties, the subject matter, and the language employed, and will construe a statement made therein to be a warranty only when it clearly appears that such was the intention of the contracting parties, and that the mind of each party consciously intended and consented that such should be

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the interpretation of his statements. *Aetna Ins. Co. v. Simmons*, 49 Neb. 811.

2. ———: **ACTION ON POLICY: DEFENSES: STATEMENTS IN APPLICATION: PLEADING AND PROOF.** And in order that the statements in such application shall constitute a defense to an action upon the certificate of membership or policy of insurance, issued to such applicant, it is incumbent upon the association to plead and prove that the answers were made as written in the application, that they were false in some particular material to the insurance risk, and that the association relied and acted upon those answers. *Aetna Ins. Co. v. Simmons*, 49 Neb. 811.
3. **Contracts: VALIDITY: PUBLIC POLICY.** A contract between an adult man and woman, not related to each other, that, if the latter will enter the home of the former and act as his housekeeper, he will support her and at his death leave her his estate, is not, where the relations between them are at all times moral and proper, forbidden by law or obnoxious to public policy.
4. **Insurance: CONSTRUCTION OF POLICY: "DEPENDENT."** Where a woman, who is without means, in good faith leaves her own home and work and assumes and for years faithfully performs the duties of a housekeeper for a member of a fraternal beneficiary association, not related to her by consanguinity, under an agreement that in consideration for such services he will support her and at his death leave her his estate, and no evidence is offered showing any improper relations between them, *held* that she thereby becomes a dependent upon such member, and as such is eligible as a beneficiary in a certificate of membership issued to him by the association of which he is a member.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Affirmed.*

A. H. Burnett, for appellant.

J. C. Kinsler and F. H. Woodland, for intervener.

Smyth, Smith & Schall, contra.

FAWCETT, J.

From a judgment in favor of plaintiff upon a certificate of membership, issued by defendant to Joseph A. Lipps, and payable by its terms to plaintiff, defendant and intervener separately appeal.

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The petition alleges that defendant is a corporation under the laws of Nebraska; that on December 11, 1901, it issued a certificate for \$1,000 upon the life of Joseph A. Lipps, in which it agreed to pay to plaintiff, "a dependent and niece," at the death of said Lipps, \$1,000; that all assessments were duly paid from time to time, and that said Lipps died January 17, 1908; that shortly after the death of Lipps defendant refused to furnish plaintiff any blanks upon which to prepare proofs of death, denied all liability to plaintiff upon such certificate and refused to pay the same. Prayer for judgment. Intervener, Sarah E. Lipps, filed her petition, asking to be allowed to intervene, for the reason that she was the wife and widow of the deceased; that at the time of his death plaintiff did not and could not have an insurable interest in the life of said Lipps, and could not be a beneficiary in said contract, and that, "under the law and the terms and provisions of the by-laws and articles of incorporation of the defendant, she is entitled to the proceeds of said policy." Defendant filed its answer to the petition of plaintiff, in which it admits its incorporation, the issuance of the certificate to Lipps, in which "it agreed, among other things to pay to Mary M. Goff a sum not exceeding one thousand (\$1,000) dollars on the death of said Joseph A. Lipps," the correctness of the copy of the certificate attached to plaintiff's petition, the payment of all the assessments, the death of Lipps as alleged, the request of plaintiff for blanks on which to make proof of death, the refusal to furnish the same, and the refusal to pay the money or any part thereof to plaintiff.

The answer then alleges that the defendant is a fraternal beneficiary association, and that the certificate was issued upon a written application made by Lipps, and on the conditions named in his application, one of which was that plaintiff was his niece; that the statement made by Lipps as to the relationship of plaintiff was false; that they were not in any manner related by

consanguinity, and that plaintiff was not in any manner dependent upon Lipps. It then sets out *in extenso* the statements made in the application, the conditions contained in and indorsed upon the certificate, and the agreement therein that all such statements and conditions should constitute the basis for and form a part of the certificate, and making the same warranties on the part of the applicant, and an agreement that any untrue statements or answers contained in the application or made to the examining physician, or any concealment of facts or failure to comply with the laws, rules and usages of the order should render the certificate void, and that all rights of any person thereunder should become forfeited. Plaintiff replied to the answers of both intervener and defendant; said replies being substantially general denials.

The trial proceeded to the court and a jury upon the issues thus framed. When all parties had rested, each moved the court for a peremptory instruction. The court thereupon made the following order: "I will excuse the jury and take the case from the jury, a question of law solely being in the case." To this order the intervener alone excepted. This action of the court having been invited by all of the parties, neither can now predicate error thereon.

As it appears to us, the case involves but two simple propositions: (1) Was the statement in the application, that plaintiff bore the relation to the applicant of niece, a warranty, the falsity of which would, regardless of its materiality to the risk, render the certificate void? (2) Was plaintiff a dependent within the meaning of the constitution and by-laws of defendant, and of the statute in relation to such societies? We will consider these two points in the order named.

1. The wording of the application is: "I hereby direct that the amount of the beneficiary fund, to which my beneficiaries may be entitled at my death, shall be paid to Mrs. Mary M. Goff, residing at 1110 South Eighth,

related to me as niece." Authorities are cited by defendant, from other jurisdictions, which sustain its contention that a false answer avoids the policy, where the application provides that all of the answers of the applicant contained therein are express warranties, and that, if any of them are shown to have been false, the policy is void. It would serve no good purpose to refer to those cases here, for the reason that this court is, by repeated decisions, committed to the rule that, "In construing a contract, for the purpose of determining whether the statements made therein were intended by the parties thereto to be warranties or representations, the court will take into consideration the situation of the parties, the subject matter, and the language employed, and will construe a statement made to be a warranty only when it clearly appears that such was the intention of the contracting parties; that the mind of each party consciously intended and consented that such should be the interpretation of his statements." *Ætna Ins. Co. v. Simmons*, 49 Neb. 811. In the opinion in that case (p. 842) we said: "We reach the conclusion, therefore, that in order that the answers under consideration—made by the assured—constitute a defense to this action, it was incumbent upon the insurance company to plead and prove not only that the answers were made as written in the application, but that they were false; that they were false in some particular material to the insurance risk; and that the insurance company relied and acted upon these answers." The rule there announced has been followed in *Kettenbach v. Omaha Life Ass'n*, 49 Neb. 842, *Ætna Life Ins. Co. v. Rehlaender*, 68 Neb. 284, *Bankers Union of the World v. Mixon*, 74 Neb. 36, and in a number of other cases, which we will not encumber this opinion by citing. While this rule, when originally announced in the *Simmons* case, may have been a "blazed trail," it has now become a beaten path in which we are content to travel. That the statement in the application here, that plaintiff bore the relation to the de-

ceased of niece, was not material to the insurance risk seems clear. The falsity of that statement in no manner shortened the life of the deceased, and hence did not increase the hazard assumed by defendant. If plaintiff had been required to prove this relationship, in order to bring herself within the class which defendant was permitted to insure, then there could have been no recovery by her; not because of the falsity of the statement, but because of the fact that she was not one of a class who, under the statute and the constitution and by-laws of the defendant, could lawfully become a beneficiary. This brings us to a consideration of the second point.

2. Section 94, ch. 43, Comp. St. 1909, provides: "No fraternal society created or organized under the provisions of this act shall issue beneficiary certificate of membership to any person under the age of eighteen years, nor over the age of fifty-five years. Payment of death benefits shall only be made to the families, heirs, blood relations, affianced husband or affianced wife of, or to persons dependent upon, the member." The constitution and by-laws of defendant follow this statutory requirement. Was plaintiff "dependent upon the member," within the meaning of the statute and of the laws of the order?

The evidence shows that plaintiff is the widow of one James O. Goff, who died in Kansas, leaving plaintiff and three children surviving. Shortly thereafter one of the children died. After the death of this child plaintiff lived for two years with a sister-in-law in Missouri and for four years with a brother, the latter two of such years in "Dakota," during all of which time she kept her two children with her. The brother with whom she was living having removed from "Dakota," she remained there, working at day's work to support herself and children. When the older of the two boys was able, he went to work in "Dakota." From "Dakota" she came with her other child to Nebraska, and after stopping a while at Norfolk went to Columbus. While working

there, supporting herself and son, she met the deceased. Her boy was then 15 years of age. At the time she met deceased he was selling sewing machines. In the preparation of a lease for a machine which she had purchased from him, he asked her name and the name of her mother, and, upon being informed, told plaintiff that he had a niece who married a man by the name of Goff. She told him her mother's name was Nancy Lee, and he said he had a half-sister by that name. He told her that she was raised by a family by the name of Lee, and that he was her uncle. It appears that she knew little of her family record. About a month or so later plaintiff became seriously ill, which illness lasted about four months. Deceased went to her house and, with the aid of her son, took care of her. She testified that, after she had recovered, deceased said to her: "If I would come and keep house for him; we would work together and have a home together, he would have a home and I would have a home. He said I was not able to work and support myself, but that I could keep house for him and we would live together and he would support me, and at his death I should have what he had;" that, when deceased obtained the certificate of insurance in controversy, he gave it to her, and it remained in her possession until his death; that he also executed a will in her favor; that he did not stay at her house when he was in town before she went to keep house for him, but stayed at the hotel; that after she assumed the duties of housekeeper they, together with her boy, resided at different places named when they settled in Omaha, where they lived for several years and until the death of Mr. Lipps. One year of the time, prior to settling in Omaha, was spent at Papillion. Her son always lived with her in the same house, and her other son sometimes visited them. Mr. Lipps had a wife and son residing in Omaha during at least the last three years of Mr. Lipps' life.

The charge is made that Lipps had abandoned his wife and children, and that he and the plaintiff lived to-

gether illicitly for years and up to the date of his death. We have before us three abstracts, the main abstract prepared by defendant, a supplementary abstract by intervenor, and one by plaintiff. These abstracts are barren of any proof to sustain either of these charges against plaintiff. It is claimed in the briefs that the trial court found that the relations between plaintiff and Lipps were illicit. We do not think the language used by the trial judge will bear any such construction. For him to have made such a finding, he would have been compelled to go outside of the evidence and indulge in conjecture not warranted thereby. This the learned trial judge did not do.

Cases are cited in which persons, situated somewhat similarly to plaintiff, have been held not to be dependents within the meaning of statutes not materially unlike our own; but in every such case the relations between the claimant and the deceased were shown to have been meretricious. No case has been cited, nor do we think one will ever be decided, holding that a woman, who, without means, in good faith leaves her own home and work and assumes and for years faithfully performs the duties of housekeeper for a man who agrees, in consideration therefor, to support her and at his death leave her his estate, does not thereby become a dependent upon him; and especially so where there is an entire absence of evidence to show any improper relations between them.

The right of a plaintiff to recover in an action like this is fully sustained in *James v. Supreme Council of the Royal Arcanum*, 130 Fed. 1014, and *McCarthy v. Supreme Lodge New England Order of Protection*, 153 Mass. 314, 11 L. R. A. 144, which case is cited and followed 15 years later in *Wilber v. Supreme Lodge New England Order of Protection*, 192 Mass. 477.

Our attention has been called to the recent case of *Royal League v. Shields*, 251 Ill. 250. That case was decided by a divided court. The majority opinion

held that plaintiff was not entitled to recover. The dissenting opinion (by three of the justices) makes out a strong case in favor of a recovery, even under the facts disclosed in that case. A single quotation from the majority opinion will show that, had the facts been as they are here, plaintiff's action would have been sustained. The opinion states: "*Frieda Wassmann was not related in any way to Michael Shields. She was not his daughter by nature or adoption. She had at no time been a member of his family or his household. He could not legally have been compelled to assist in her support, nor was he morally bound to furnish her support or leave her this money. Had she been at the time of his death a member of his household a different situation might have been presented, and the case of Wilber v. Supreme Lodge New England Order of Protection, 192 Mass. 477, cited by appellant, might then have been in point.*" (The italics are ours.) In the dissenting opinion it is said: "He voluntarily assumed the burden of contributing to her support in a regular and substantial manner and did so regularly for nine years before his death. In my opinion these facts bring appellant within the definition of a dependent, and as such made her eligible as a beneficiary under the statute and the by-laws of the Royal League and entitled her to the money paid into court by the association." It thus appears that both the opinion and dissenting opinion sustain a recovery in this case.

We think the language in *Keener v. Grand Lodge, A. O. U. W.*, 38 Mo. App. 543, is apt: "I would not restrict dependents to those whom one may be legally bound to support, nor, yet, to those to whom he may be morally bound, but the term should be restricted to those whom it is not *unlawful* for him to support." That it was lawful for Lipps to bind himself to support plaintiff under the circumstances shown cannot be doubted. That he did so bind himself is equally clear. That such a contract is not obnoxious to public policy is beyond question.

The reasoning of the above cited cases appeals to us as eminently sound. Without pursuing the matter further we hold: (1) That the answer of the deceased in his application, that plaintiff bore to him the relation of niece, whether it be termed a representation merely or a warranty, was not material to the risk, and hence did not avoid the policy. (2) That plaintiff was, at the time the application was signed and the certificate issued, and at the time of the death of Mr. Lipps, dependent upon him for her support, and that she is therefore competent to take as the beneficiary named in the certificate in suit.

The judgment of the district court is therefore

AFFIRMED.

JOHN W. DORRINGTON, SR., ET AL., APPELLEES, V. DAVID W. SOWLES, APPELLANT.

FILED JANUARY 3, 1912. No. 17,101.

1. **Appeal: CONFLICTING EVIDENCE.** In a law action, where the evidence is sufficient to sustain a judgment either way, the judgment of the trial court will be sustained on appeal.
2. **Forcible Entry and Detainer: NOTICE TO QUIT.** Section 1022 of the code, requiring at least three days' notice as a condition precedent to the commencement of an action of forcible entry and detention, confers upon a tenant a right, which he may either rest upon or waive.
3. ———: ———: **WAIVER.** And if, upon the trial of such an action, he objects to the introduction of a notice, defective in that particular, which has been duly served, upon other specific grounds only, he will be held to have waived such defect.

APPEAL from the district court for Richardson county:
JOHN B. RAPER, JUDGE. *Affirmed.*

Clarence Gillespie and Edwin Falloon, for appellant.

Reavis & Reavis, contra.

FAWCETT, J.

This action, of forcible entry and detention, was instituted in justice court and appealed to the district court, where it was tried to the court and a jury. When both sides had rested, each moved for a directed verdict. The motion of defendant was overruled and that of plaintiffs sustained. The judgment was entered for plaintiffs, and defendant appeals.

Defendant now urges that the court erred in taking the case from the jury. The rule that, where such action of the court below is invited by all of the parties, neither can predicate error thereon, is now too well settled in this court to longer require citation of authorities or reference to the rule in the syllabus.

The petition alleges the ownership of the property in controversy; that defendant had been a tenant from month to month; that on February 1, 1910, plaintiffs notified defendant in writing that his tenancy would end on March 1, 1910; that on March 1 they gave defendant a further notice in writing to quit and deliver up possession of the premises within three days of that date, and that defendant still forcibly and unlawfully retains possession. The answer denies every allegation not specifically admitted, admits the ownership of the building and the service of notice to vacate within three days, and alleges that defendant was holding the property in controversy under a lease expiring August 1, 1913, a copy of which is set out, but which need not be set out here. The answer contains some other allegations which we do not deem it necessary to refer to. The reply is a general denial, with a special denial that the defendant was holding under any written contract or that "he is anything other than a tenant of said property by sufferance."

It appears from the abstracts that defendant had been a tenant of the premises for many years. Mr. Dorrington, one of the plaintiffs, and the one who seems to have had the chief control of the property, testified that he re-

turned from a trip to Washington in May, 1907; that at that time defendant was behind some with his rent; that "he told me he wouldn't pay any of the rent unless I took in a shed he had built at the end or back of the store building, as he could get no special benefit from making ice cream unless I allowed that amount of money. I asked what it was, and he wanted us to pay for the shop. I didn't think it was right, we had fixed the room up, and I objected to it; but he insisted so strong, I said, 'All right, if I do you will have to pay me \$50 a month for the building' (the rent prior thereto had been \$40 a month), and he objected to that, and we finally compromised on \$45 a month. There was no other reason why that rent was raised to \$45. There was nothing said at that time about a long lease." On October 5, following, defendant prepared and signed the written lease, referred to in the answer, and submitted it to plaintiffs. Mr. Dorrington testifies that when he received it, on the evening of October 5, he was busy preparing to again visit Washington; that he signed the lease and left it with Mr. Towle, the husband of one of the other joint owners of the property. Before signing the lease Mr. Towle wrote in above the signature of defendant the words: "Said Sowles not to sublet said premises or any part thereof without the written consent of W. E. Dorrington." The lease was then witnessed and dated October 5, 1907. Below the signatures was written the notation: "The interlineations and changes made in foregoing contract were made by consent of both parties to same." This was dated "Oct. 5, 1907," and signed at that time by Mr. Dorrington. The testimony of Mr. Towle is: "I took the leases to Mr. Sowles the next morning. He looked them over, and said he would consider them, or he didn't know whether he would sign them or not. I didn't know whether he would agree to the contract as amended or not. I left the instrument with him. I conferred with him several times subsequently, and he kept putting me off. He said his boy

wanted him to sell out, and he was talking about taking a hotel in Fairbury first or probably in St. Joe. They wanted him to take charge of it. And I went in four or five times to get him to sign the contract and give us the duplicate, but he kept them and wouldn't sign it. When I asked him to sign the contract he made excuses. This was about a week or two afterwards." Defendant testified that, when Mr. Towle returned the leases to him, "I was busy and told him I would look the lease over and sign it. Mr. Towle called twice afterwards, within a week. When he called the next time I told him I hadn't signed it, as I was about to take a hotel at Fairbury, and in case I didn't get that I would continue there and sign the lease." The duplicate leases remained in the custody of defendant from that time until after plaintiffs had served him with the notice of February 1, 1910, when he produced the leases, signed as above shown. He says he had left the lease in a drawer, "and in rummaging around in the drawer I found it one day;" that he then signed it on the date shown under his signature, viz., August 10, 1909. He further testified: "I know the contract was written on the strength of the \$5 raise."

The above extracts from the testimony of these witnesses show that there was a square conflict in the testimony upon the point as to whether defendant was ever, with the knowledge of the plaintiffs, in possession of the premises under the lease, or that the instalments of rent, which he subsequently paid, were paid by him under the supposition that they were being paid under the lease. If the evidence clearly showed that he was in possession under the lease, then the payment of rent by him and the acceptance thereof by plaintiffs would have bound both parties, even though defendant had never signed it, for the one year provided in the lease; and in like manner a payment of rent by defendant and acceptance of the same by plaintiffs without objection, after the expiration of the one year, would have made the lease good for the full period of five years. In such case the contention

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of defendant and the authorities cited by him would be in point, and, had the trial court so found, we could not have disturbed such finding; but having found against defendant upon those points, upon testimony so substantially conflicting, we are in like manner concluded by such finding.

It is further objected by defendant that neither the justice court, the district court, nor this court has jurisdiction, for the reason that the notice served on March 1 to vacate within three days was insufficient, the suit having been commenced on March 4. Ordinarily this point would be good; but in the present case we think defendant has waived the right to insist upon this assignment. Upon the trial in the district court, when plaintiff offered the notice (exhibit 2) in evidence, defendant made this objection: "We admit that about March 1st, 1910, exhibit 2 was served upon the defendant, but object to its introduction because it is not a notice provided by law and that he should have been served with a six months' notice." This objection was properly overruled. It did not challenge the sufficiency of the notice upon the ground now urged. Defendant had been insisting all the time that he was in possession under a lease that would not expire until 1913, and that in any event he was a tenant from year to year, and as such was entitled to a six months' notice, and the objection above noted was in line with that contention.

Finding no reversible error in the record, the judgment of the district court is

AFFIRMED.

**JENNIE E. BROWN, APPELLANT, v. ORLANDO W. WEBSTER,
ADMINISTRATOR, ET AL., APPELLEES.**

FILED JANUARY 3, 1912. No. 17,203.

1. Wills: RECIPROCAL WILLS: PAROL CONTRACT INTER VIVOS. Where a husband and wife, possessed of separate estates, orally agree that

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upon the predecease of either the survivor shall thereupon become the owner of all of the estate, both real and personal, of such decedent, and at the same time, and in pursuance of, and for the expressed purpose of providing a proper method of carrying such agreement into effect, simultaneously execute reciprocal wills, in each of which the other spouse is made sole devisee and legatee, *held* that the oral agreement and the execution of the wills constitute a single transaction, that each is an integral part of one contract, and that such contract cannot be said to rest entirely in parol.

2. ———: ———: ———: CONSIDERATION. And, in such a case, the contract of each is a sufficient consideration for the contract of the other.
3. ———: ———: ———: PERFORMANCE. And the continued reliance by plaintiff upon the contract, by permitting her will executed as a part thereof to remain in the family safe, unchanged and unrevoked, during the entire lifetime of the deceased, constituted full performance by her of the terms of the contract.
4. ———: ———: REVOCATION. And the wills, executed as a part of such contract, in equity, are not ambulatory, and may not be revoked by either party to such contract so long as the other party continues to perform the contract on his or her part.
5. ———: ———: PAROL CONTRACT INTER VIVOS: SPECIFIC PERFORMANCE. And where either party to such a contract commits a breach of the same by subsequently executing another will, devising and bequeathing his estate contrary to the terms of such contract, and dies, the survivor, upon proof of a continued performance thereof, in good faith, on his or her part, is entitled to a specific performance of the contract, as against the heirs, devisees, legatees, and executors of the decedent.
6. Pleading. The petition, set out in the opinion, examined, and *held* sufficient.

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Reversed.*

Field, Ricketts & Ricketts, for appellant.

Charles O. Whedon and Perry, Lambe & Butler, contra.

FAWCETT, J.

The petition alleges, substantially: That Erastus E. Brown, late of Lancaster county, died August 15, 1908,

possessed of a large amount of real and personal property, which is specifically set out; that he left no heirs of his body and that plaintiff is his widow; that at the time of her marriage to the deceased, in 1866, deceased did not own property exceeding in value the sum of \$1,000; that at the time of her marriage, or shortly thereafter, plaintiff received from her mother's estate about \$20,000, all of which she turned over to deceased, who managed, controlled and invested the same in his own name as if it were his own money; that nearly all the property purchased with such funds was taken in the name of deceased, and was by him held and transferred as his own; that from time to time, as convenience suggested, an occasional piece of property was taken in the name of plaintiff, the description of which property is set out. As to one of the pieces described, it is alleged that it was sold in 1882 at a profit of \$8,000, and the consideration paid to and used by the deceased; that another piece described was also sold and the proceeds paid to and used by deceased; that in January, 1896, plaintiff had standing in her name real property of the reasonable value of \$40,000 or \$50,000; that at the same time deceased owned property and securities of the value of \$50,000 or \$60,000; that no accounting was had at any time between plaintiff and deceased of the moneys turned over by her to deceased or of the profits and income arising from the investment thereof; that in January, 1896 (30 years after their marriage), plaintiff and her husband had no children to whom to leave their property; that at the suggestion of the deceased at that time a parol contract was entered into by and between plaintiff and deceased, by the terms of which it was agreed that the survivor should, on the death of the other, become the exclusive owner of all the property, both real and personal, that should then be owned by the one who should first depart this life, "the agreement of one being the consideration for the agreement of the other;" that at the time the deceased suggested that "a proper method to

carry said agreement into effect was for each to execute a will, making the other sole devisee and legatee of all of the property of which he or she should die seized;" that, in pursuance of said agreement, the deceased caused wills to be prepared, one for himself to execute and the other to be executed by plaintiff, which wills were accordingly executed by plaintiff and deceased respectively, "each being executed in consideration of the execution of the other." A photographic copy of each of said wills is attached to the petition as a part thereof, and shows that they were both written by the same person, and, as it appears by comparison with the signature of the deceased, by the deceased himself. The will executed by deceased made plaintiff sole devisee and legatee of all of the property of which he might die seized, and that executed by plaintiff made the deceased sole devisee and legatee of all of the property of which she might die seized. The wording of the two wills is identical, except as to the change of name and sex. Both wills are signed in the presence of the same attesting witnesses. The petition further alleges that after the execution of the wills deceased caused them to be placed in an envelope and delivered to plaintiff for safe keeping; that they were placed by plaintiff in the family safe, where they remained until after the death of deceased; that in good faith and in full reliance on the agreement made and entered into by and between the parties, as above set out, "and the irrevocable character of said agreement, and of the wills executed by the respective parties in pursuance thereto, the plaintiff permitted the deceased to use and deal with the property of the plaintiff, held in her right, as hereinbefore alleged, as if it were his own property. He not only collected, invested and used, in his own name, the income arising from plaintiff's property, but, also, money received as consideration for the sale of her property, as if the same were his own money;" that in April, 1902, deceased sold the farm owned by plaintiff at the time of the agreement referred to, and received on

the contract price, between the date of sale and the time of his death, the sum of \$7,750, all of which he kept and used as his own, and had not accounted to plaintiff for any portion thereof; that he used plaintiff's residence, in which had been invested the sum of about \$40,000, for many years as the family home without rent or compensation, while the income from his other property, as well as that from plaintiff's property, was invested in his own name, thereby increasing his holdings at the expense of plaintiff's estate; that deceased at no time intimated or notified plaintiff that he wished to modify or revoke the will which he had made in plaintiff's favor in execution of said agreement; that plaintiff in all things fully kept and performed the agreement, made between herself and deceased, as alleged, in consideration for which he agreed to make plaintiff sole devisee and legatee of all property, real and personal, of which he should die seized, if he should first de cease; that the will which she executed in due form in January, 1896, making deceased her sole devisee and legatee, is still in full force and effect and unrevoked; that "as the conditions on which plaintiff was to have and receive all of the real and personal property of the said Erastus E. Brown, as her own property, have come to pass, and as the plaintiff has fully kept and performed the agreement on her part, she has become the equitable owner of all the real and personal property of which the deceased died seized. And as the deceased, before his death, committed a breach of said contract, she is in equity entitled to have the same specifically performed by his estate, and those who claim under him;" that in the latter part of July, 1908, it was arranged between plaintiff and deceased to visit friends in the state of New York; that deceased also desired to visit his three brothers in and near Angola, Indiana; that by reason of the illness of a servant in their household, which they felt rendered it unsafe to then leave her alone, it was arranged between them that deceased should proceed to

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Indiana and there visit his brothers, that plaintiff should remain at home until it was deemed safe to leave the servant, when she would proceed to northern Michigan and spend a few days with a friend, and then join the deceased at Angola, from whence they would proceed together to New York; that, in pursuance of said arrangement, deceased left home for Indiana on July 26, 1908; that plaintiff remained at home until August 2, 1908, when she proceeded to northern Michigan, where she remained until August 10, when she proceeded to Angola, reaching there on the evening of August 11; that on her arrival she found deceased dangerously ill from urinary trouble, with which he had been suffering for three or four days, but of which she had no notice until her arrival; that he survived until August 15, when he passed away; that on the afternoon of August 11, 1908, and before plaintiff reached the bedside of deceased, deceased executed another and different will from that made in pursuance of the agreement made with plaintiff, and by which latter will he gave plaintiff an interest for life in certain property, and gave all the rest and residue of his estate to the defendants Frank M. and Clinton M. Brown, sons of the deceased's brother, Ezekiel, and Charles W. Brown, Homer H. Brown and Laura E. Talmage, children of Warren Brown, another brother of deceased, except a small legacy of \$1,500 to Augusta Kreitlow, a long-time servant in the house of plaintiff and deceased; that on January 26, 1911, the will of August 11, 1908, was approved and allowed in the county court of Lancaster county, Nebraska, as the last will and testament of the deceased; that no appeal has been taken from the order probating said will. A true copy of the will is attached to the petition. That by reason of the premises the defendants Brown and defendant Talmage have become vested with a legal title to all the real estate belonging to the estate of the deceased, and the right to receive on final distribution of said estate all of the personal property or its proceeds belonging to said estate,

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subject only to the rights of plaintiff as widow in the estate of the deceased; that from the time deceased arrived in Indiana the defendant Talmage became his daily companion, went with him from the residence of one brother to that of another, and continued to be his constant and daily companion from the time of his arrival until plaintiff reached his bedside on the evening of August 11; that at some time prior to making his will deceased gave to defendant Talmage \$3,000 in gas bonds which he had taken with him from Lincoln, and also gave to his brother William M. Brown a note and mortgage owned by deceased of \$1,500, to be held by him for the use and benefit of the defendants Frank M., Charles W. and Homer H. Brown; that after plaintiff's arrival at the bedside of deceased he was more or less lucid mentally, yet neither he nor any other person notified or intimated to plaintiff that deceased had made and executed the will of August 11, or that he had given to defendants the securities above referred to, until after the demise of the deceased; that plaintiff declined to act as executrix of the will of August 11, and defendant Webster has been appointed administrator with the will annexed; that as such administrator defendant Webster is now in possession of the real estate belonging to said estate, and is collecting the rents and income therefrom; that he is also in possession of all of the personal assets belonging to said estate; that all of the debts of said estate, except a small claim of \$25, which is still pending, have been paid, and all claims against said estate have been barred by limitations by order of the county court; that the instrument approved and allowed as the last will and testament of the deceased operated as a breach of his agreement with plaintiff; that no consideration passed from either of the defendants to the deceased for the provisions made in their behalf in said last will and testament, and that no consideration passed from defendants Talmage, Frank M., Charles W. and Homer H. Brown for the securities given to them, nor was the

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deceased in any way legally or morally obligated to provide for any of said defendants by will or otherwise; that the provisions so made were entirely voluntary and without consideration; that plaintiff had duly renounced the provisions made for her in the instrument probated as the last will and testament of the deceased, and claimed such share in said estate as was given her by law; that the provision made for Augusta Kreitlow, in the will of deceased, met with the approval of plaintiff, and shortly after the death of deceased plaintiff paid to Augusta the sum of \$1,500, the amount of the legacy in her behalf, and took from her an assignment thereof. Plaintiff prays that defendant Webster, as administrator, be restrained from parting with the possession of the whole or any portion of the real estate belonging to said estate and from making any distribution of the personal assets thereof, and that defendants Brown and defendant Talmage may each be enjoined from taking or attempting to take possession of any part of the real estate of deceased and from taking any order for the distribution of the personal assets of said estate, pending the final determination of this suit; that plaintiff be decreed specific performance of the agreement entered into between herself and the deceased, whereby she was to become possessed of the legal title to all the real and personal property of which deceased should die seized; that her title to the several pieces of real estate described and to all the personal assets of said estate be quieted and settled in the plaintiff, as against the several defendants and each of them; that defendants and each of them be foreclosed and barred from all right, title, interest or demand in and to any part or portion of the real and personal property belonging to the estate of said deceased; that defendant Webster, as administrator with the will annexed, and his successors in office may be ordered and adjudged to turn over and account to plaintiff on final settlement of said estate for all the personal property and personal assets belonging to said

estate, which have come into his hands as such administrator, and which have not been consumed in the settlement of said estate; and "for such other, further and different relief as may be necessary to fully vest in the plaintiff full and complete title to all of the estate, both real and personal, of the late Erastus E. Brown, or that may be necessary to forever bar the several defendants of all right, title, interest, claim, or demand in and to any portion thereof."

To the above petition the defendants, other than defendant Webster, demurred upon two grounds: "First. That the court has no jurisdiction of the subject matter in this action. Second. That the petition does not state facts sufficient to constitute a cause of action in favor of the plaintiff and against these demurring defendants." The first ground of demurrer was overruled and the second sustained, and, plaintiff electing to stand upon her petition, the suit was dismissed at her cost. From the judgment so entered, plaintiff appeals.

The objections to the petition urged by demurrants are, substantially: That the contract between plaintiff and deceased, that the survivor should become the owner of all of the estate, real and personal, of the deceased spouse, rests entirely in parol, and, as it affects the title to real estate, is void under the statute of frauds; that such contract was not aided by the execution of the reciprocal wills; that the oral contract and the wills are alike without consideration; that the will of the deceased was ambulatory in its character and revokable at his pleasure, and that the execution of the wills did not constitute part performance. These points are so interwoven that we will consider them together.

The fact that a contract, of the nature of the oral agreement alleged, would rest in parol would not necessarily render the same void. Section 3 of the statute of frauds (Comp. St. 1911, ch. 32), relied upon by defendants, is qualified by the exceptions noted in sections 4 and 6 of the statute. Section 4 provides: "The prece-

ding section shall not be construed to affect in any manner the power of a testator in the disposition of his real estate by a last will and testament, nor to prevent any trust from arising or being extinguished by implication or operation of law." Section 6 provides: "Nothing in this chapter contained shall be construed to abridge the powers of the court of chancery to compel the specific performance of agreements in cases of part performance." It will be seen by these two sections: First. That section 3 cannot be construed to affect in any manner the power of the deceased in the disposition of his real estate by a last will and testament, as was done by the will of January, 1896; and hence, even if it were to be conceded that the agreement by the deceased that, if he predeceased his wife, she should become the owner of all of his real estate, and the will executed by him to that effect were separate agreements, the execution of the will, if executed "in pursuance to said agreement," as alleged, would bring the case within the scope of section 4. Second. Under the provisions of section 6, if there was a part performance by plaintiff of the agreement on her part, then under the well-settled rule in this state section 3 of the statute of frauds would not apply. In this case we think there was not only part performance by the plaintiff, but that the performance by her of her part of the agreement was a complete performance. She at once executed the will provided for in her agreement with her husband, and never receded from it, but at all times, during the period of more than 12 years which elapsed before the death of her husband, acted upon it, and thereby continually affirmed it. This constituted not only performance by her, but a good and sufficient consideration for the contract. The deceased himself acted upon the contract, completed by the execution of the wills, and continued performance thereof from the time of its execution in January, 1896, until the 11th day of August, 1908—four days prior to his death. This action on his part shows that, during every day of that

period of more than 12 years, he was in effect asserting and relying upon the contract which he had entered into with the plaintiff. This constituted a sufficient consideration, and performance during that period, of the contract on his part, and, had the condition of the parties been reversed and plaintiff had died first, the deceased could and doubtless would have asserted his rights under the contract, as evidenced by plaintiff's will. It is unfortunate that he, in the absence of his wife, while in the hands of his collateral heirs, and in the face of a speedy demise, should have committed a breach of the contract which he himself had induced his wife to enter into with him. We are unable to consent to the theory that the agreement between the plaintiff and deceased, as to what should become of the estate of the one who should die first, and the execution of the wills were separate transactions. The so-called oral contract and the execution of the wills were made, entered into and executed at the same time. The allegations of the petition are that in January, 1896, "at the suggestion of the deceased" a parol contract was entered into by and between the deceased and plaintiff in the manner above set out, and that "the deceased at the time suggested a proper method to carry said agreement into effect was for each to execute a will, making the other sole devisee and legatee of all of the property of which he or she should die seized. He, therefore, in pursuance to said agreement, caused wills to be prepared and drawn, one for himself to execute, and one for the plaintiff to execute, which wills were accordingly executed," etc. It is a fact well known to the members of this court and admitted in the briefs of both sides that the deceased was an able lawyer of many years' experience. He desired that this contract be made. They had been married for 30 years, and had no children. They had no debts or any one dependent upon their bounty. The years had been passing, and he, realizing that death might at any time remove one or the other, with the care and forethought

characteristic of the man, desired to provide against such contingency. He therefore suggested this plan of disposing of their property. It was agreed to by his wife. His knowledge as a lawyer was such that he realized the importance of reducing the terms of this agreement to writing. He therefore suggested the making of reciprocal wills as the "proper method to carry said agreement into effect." This also was assented to by the plaintiff, and he, with his own hand, drew the wills and had them simultaneously executed in full compliance with the laws of this state. It would be a travesty upon justice to say that everything that was said and done on that occasion did not constitute a single transaction. It is not a question, therefore, of whether or not the execution of the wills aided an oral contract; the question is, were the wills an integral and important part of the contract? We hold that they were, and that from the moment the wills were executed the contract no longer rested entirely in parol. We also think it would be doing violence to every rule of equity to hold that the contract of each, of which the will was a part, was not a good consideration for the contract of the other. We think the consideration of each was both a good and valuable consideration; but, even if it were to be held that it did not constitute a valuable consideration, in the sense that no money was paid or property delivered or personal services performed by the one to or for the other, the contract would still be enforceable for the reason that it was supported by a good consideration. Conceding that a contract by A to make a will in favor of B, that upon A's death he would leave all of his property to B, could not be enforced by B, as against the creditors of A, or as against those having a superior equity to B, yet, if there are no creditors and no one possessing superior equities to B, then a good consideration would be sufficient to entitle B to enforce the contract after A's death. *Parsell v. Stryker*, 41 N. Y. 480, 485; Underhill, Law of Wills, sec. 285.

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That a contract to devise real estate, where there has been performance by the promisee, is good in this state is settled in this court by *Kofka v. Rosicky*, 41 Neb. 328; *Teske v. Dittberner*, 65 Neb. 167, 70 Neb. 544; *Peterson v. Estate of Bauer*, 76 Neb. 652; *Peterson v. Bauer*, 83 Neb. 405; *Pemberton v. Heirs of Pemberton*, 76 Neb. 669; *Harrison v. Harrison*, 80 Neb. 103; *Cobb v. Macfarland*, 87 Neb. 408; *Johnson v. Riseberg*, ante, p. 217. That the execution of the wills satisfied the statute of frauds, see *Brinker v. Brinker*, 7 Pa. St. 53; *Shroyer v. Smith*, 204 Pa. St. 310; *Keith v. Miller*, 174 Ill. 64; *Bruce v. Moon*, 57 S. Car. 60, 35 S. E. 415. That the will of deceased was not, in equity, ambulatory or revocable, see *Teske v. Dittberner*, 70 Neb. 544, where, in the seventh paragraph of the syllabus, we held: "A contract to leave property by will is not ambulatory or revocable, as being testamentary in character, after the promisee has performed his part of the contract." See, also, *Bolman v. Overall*, 80 Ala. 451; *Johnson v. Hubbell*, 2 Stock. Ch. (N. J.) 332; and *Rivers v. Executors of Rivers*, 3 Desaus. Eq. (S. Car.) 190, where it is said: "By this agreement (to make a will of a particular tenor) he has renounced that absolute power of disposing of his estate at his pleasure, or even at his caprice, with which the law had clothed him; and I cannot doubt that he could bind himself to do so. * * * A man may renounce every power, benefit, or right, which the laws give him, and he will be bound by his agreement to do so, provided the agreement be entered into fairly, without surprise, imposition, or fraud, and that it be reasonable and moral. * * * It appears to me that to make a will in a particular way, on proper considerations, is as much a subject of contract as any other; and he who makes a contract on this subject is as much bound thereby as he would be by any agreement on any other subject." See, also, *Bruce v. Moon*, 57 S. Car. 60, 71; *Parsell v. Stryker*, 41 N. Y. 480, 486, 487. The contention that plaintiff parted with noth-

ing, that the manner in which she permitted her husband to manage and control her estate and take title to property in his own name and hold the same and the proceeds from sales thereof, after the execution of the contract, was not different from the manner in which she had permitted him to handle her property prior to its execution, does not impress us as being of any force. The fact is admitted that, at all times after the execution of the contract, she in good faith relied upon it by permitting her will to remain as originally executed, without any attempt at modification or revocation. If, during the four days that intervened after the deceased had broken his contract, and while plaintiff was watching by his bedside, she had been stricken with paralysis and suddenly died, the deceased would, by the terms of the contract, have immediately become vested with the ownership of all of her estate, both real and personal, and that estate would have gone, under his will of August 11, to those of his blood who appear as defendants in this case; and, if the heirs of the blood of plaintiff had attempted to assert any claim to her estate, these heirs of the blood and devisees and legatees of the deceased would be here in the role of plaintiffs, seeking a specific performance of her contract. The record before us shows that when the plaintiff and deceased were married he was worth not to exceed \$1,000; that she then had, or very soon thereafter inherited, \$20,000, which she turned over to her husband and which he subsequently used as his own in the manner set out in the petition. This was the nucleus of his fortune. Without this start in life, who can say that the deceased would not have suffered the fate of many a good lawyer, and have died without leaving sufficient estate to fight over. Plaintiff not only furnished this start, but she permitted him to use it and its accumulations and the income therefrom, as if it were his own. For the last 12 years or more of their lives she did it in reliance upon this contract. The deceased proved to be a successful business man. She

trusted him in business, and trusted him in the arrangement of all of the details of their contract and in the preparation of the wills in consummation thereof. She trusted him until the moment of his death; and, if the allegations in the petition are established upon the trial, she should now receive the reward of that faith and trust which extended over a period of more than 40 years. This is not an attempt on the part of the court or of the plaintiff to make a will for the deceased. It is simply a case of holding him to the terms of a will which he himself voluntarily and freely made as a part of a contract which he induced his wife to enter into with him, and which she honestly and in good faith fully performed on her part.

Several minor questions discussed in the briefs are not thought to be material at this time and will not be considered.

The judgment of the district court in sustaining the demurrer of defendants is clearly wrong, and it is reversed and the cause remanded for further proceedings in harmony with this opinion.

REVERSED.

Root, J.

I concur in the majority opinion, in so far as it reverses the judgment of the district court and remands the cause for further proceedings, but I do not concur in the further direction, nor in all that is said in the opinion.

The opinion assumes that there is no defense to the petition, and the district court cannot upon a second hearing follow the opinion and at the same time enter a decree for the defendants, notwithstanding a perfect defense may have been pleaded and proved.

I do not agree to the statement that mutual wills executed in conformity to a preceding oral contract constitute, with the contract, an integral part of one transaction, nor that the respective testators are powerless

to revoke their wills. The wills may furnish written evidence to take the oral contract without the statute of frauds, and if either testator subsequently, in violation of his contract, revokes his will or devises to another the property described in the oral contract, the beneficiaries whose rights are last in point of time will hold the property as trustees for the benefit of the senior devisee.

Furthermore, a decree of specific performance, within the limits of legal discretion, may be granted or withheld according to the circumstances of the case. In the case at bar neither will refers to any contract, nor can it be ascertained from an inspection of them that they were executed in conformity to an antecedent agreement. If evidence competent to establish that essential link in the plaintiff's title be not produced upon a trial, she should not prevail. If that evidence be produced, still there may be proof of such fraud, mistake, unfairness, hardship, rescission, or of changed conditions, as will justify a judgment for the defendants.

For these reasons, I go no further than to say that the petition states facts sufficient to constitute a cause of action in the plaintiff's favor, and the district court erred in sustaining the demurrer.

HENRY GLANTZ, ADMINISTRATOR, APPELLEE, V. CHICAGO,
BURLINGTON & QUINCY RAILWAY COMPANY, APPELLANT.

FILED JANUARY 3, 1912. No. 17,223.

1. **Customs: EVIDENCE.** Evidence that a certain course is "generally" and "usually" pursued in a particular manner is sufficient to establish a custom. It is not essential to show that the "particular manner" is never deviated from.
2. **Master and Servant: INJURY TO SERVANT: TRIAL: DIRECTING VERDICT.** Evidence examined and set out in the opinion, held sufficient to sustain the verdict of the jury.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

James E. Kelby, Byron Clark, A. R. Wells and M. V. Beghtol, for appellant.

Wilmer B. Comstock, contra.

FAWCETT, J.

The facts in this case are stated in a former opinion, *Glantz v. Chicago, B. & Q. R. Co.*, 87 Neb. 60. The case was there reversed on account of errors in the instructions, the question of the sufficiency of the evidence being reserved. Upon retrial plaintiff again prevailed, and from a judgment on a verdict in his favor defendant appeals.

All questions of law were disposed of in our former opinion. The testimony offered upon the first trial was, by stipulation, read to the jury, and was supplemented by the testimony of the witness Snell, and additional testimony from the witness McCutchan. The one issue of fact reserved was presented to the jury in the following instructions:

"4. It is contended by the plaintiff that the defendant was guilty of negligence because at the time of the accident no man was stationed on the foot-board of the tender as a lookout to warn employees of the approaching tender.

"Touching this contention of the plaintiff, you are instructed that if you find from the evidence that at the time and place of the accident there was no rule or custom of the defendant company to keep such a man stationed on the foot-board as a lookout, having as one of his duties that of warning sectionmen and others in danger, and that this was known to the deceased, or was to plaintiff an obvious fact which he should have known, then in such case the failure of the defendant company to have a man stationed on the foot-board at the time of the accident

would not constitute negligence upon its part such as to create any liability against them, for the reason that the deceased by continuing in their employment under such circumstances would be held to have assumed any risk of danger arising from the fact that no man was stationed on the foot-board as a lookout.

"5. But it is contended by the plaintiff that there was a custom at the time and place of the accident, according to which the defendant company did keep a man stationed upon the foot-board as a lookout, and the plaintiff contends that at the time of the accident the deceased had a right to rely upon such custom, and that a man would be stationed on the foot-board who would warn him of his approaching danger. The defendant denies that any such rule or custom existed at the place where the accident occurred, their contention being that men were stationed on the foot-board only as their convenience or work required it, and that no man was stationed there for the purpose of a lookout to warn people. They contend that this was known and obvious to the deceased and others working, and that sectionmen understood that it was a duty devolving upon them to keep out of the way of approaching tenders and cars. This presents the sole question of fact which you are to determine from the evidence.

"If you find from the evidence that no such custom existed as contended by the defendant, then your verdict should be for the defendant in this action; and this would be true whether you think the failure to have a man stationed there would be negligence on the part of the railroad company or not, because by remaining in their employ under such circumstances he would have assumed the risk and waived any liability by reason of their failure to have a man stationed upon the foot-board.

"If, on the other hand, you find that there was such a custom upon the part of the railroad company at the time, to have a man stationed on the foot-board as a lookout, then you should direct your attention to the

question whether or not, considering the nature of the work that the plaintiff and the work that the defendant were engaged in at the time, the defendant was negligent in not having a man stationed on the foot-board as a lookout to warn sectionmen of the approaching danger. If you find that the defendant was guilty of negligence in this particular, and that such negligence was the proximate cause of the death of the deceased, and you further find that he was not guilty of contributory negligence upon his part and that the plaintiff has been damaged by the death of the deceased, then the plaintiff would be entitled to recover in this action in the amount of their damages."

Some objection is made to instructions 1, 2 and 3, but we do not think they are open to the criticisms made upon them. The main contention of defendant is that the evidence is so clearly insufficient to sustain a verdict in favor of plaintiff that the court should have directed a verdict in favor of defendant. In this contention we are unable to concur. By instructions 4 and 5, above set out, we think the court properly submitted the important question involved, viz., whether there existed in the yards at Havelock, at the time of the accident in controversy, a custom, upon which deceased had a right to rely, to have a man stationed on the foot-boards of its switch engines when at work in the yard, for the purpose of guarding against injury to employees or other persons who might be upon or in dangerous proximity to the defendant's tracks. In a yard as busy as that at Havelock is shown to be, where the switching "is always around a curve," it ought not to require strong evidence of such a custom to warrant the submission of the case to a jury. The dictates of common humanity would seem to demand such a custom; and when we consider that in every switching crew there are not less than two men, in addition to the engineer and fireman, the practicability of the custom becomes apparent.

Let us take the testimony of the witnesses as set out in

Glants v. Chicago, B. & Q. R. Co.

defendant's brief. Upon the former trial the witness Langdon was asked if he was familiar with the custom generally and habitually followed by railroad companies in regard to keeping a man on the front car of a string of cars being pushed in front of an engine, to which he answered, "Yes." When asked to state that custom, he said: "Why, an engine shoving a string of cars, a man is supposed to stand on the front car, the head car, and give signals to the engineer, also at the hind end, shoving and pushing the cars. Q. To give signals to the engineer, you say? A. Yes, sir. Q. What kind of signals and for what purpose? A. Why, it all depends on where we are going. Forward, shoving a string of cars, and we are going in on a side-track, going in on a track, of course he will give me a signal to slow up, to stop and go into that switch, if we was going to put a car in there, or if we saw anything; anything like that, would give that signal to the engineer, whatever signal I got from my foreman, or the man working it, that is the one I give to him. Q. Now, just challenge your attention particularly to the matter I desire to have you speak concerning. Is the purpose of this man on the end of the car also to give warning to the engineer in case a person or object is on the track in front? A. Why, yes." On cross-examination we have the following: "Q. Was it a custom to have a man on each end of the engine, on one end of the engine away from those cars, and then on the front end of those cars, to warn people to keep out of the road? A. Why, not exactly to warn people, no, but we always have, because it is always around a curve the way we are going." After testifying as to their custom when running through the shops, we have the following: "Q. But I am talking about going out in the yards, doing switching in the yards outside of the building. A. Yes, sir. Q. Is there any custom out there? A. No, sir; only just the way we are going. If we are backing up, of course, if we have a string of cars we are on the cars. Q. You get on the cars? A. Yes, sir. Q. If you are going on the cars, is

there any custom to go on the front end there? A. Whichever way we are going; of course, if we haven't any cars going with a lone engine, we generally go on the front end. Q. Go whichever way the engine is going, you generally get on the foot-board in that direction? A. If the engine is going that way we get on the front end. If going this way, backing up, and we had hold of any cars, we get on the hind end. That is the way we generally do." On his recross-examination he testified: "Q. But you say this custom does not exist except in the blacksmith shop when you are running through the building, of keeping— A. Well, it is a rule of our own. It is a custom to ourselves whichever way the engine is going, we always took it, we always rode that way, that is, mostly, but in this certain place in this blacksmith shop, we always—I don't think there was a time the engine went through there but what one of the men was on the front of the engine." On redirect: "Q. But it was done, the custom, you rode the foot-board, the way you were going? A. Yes, sir." Upon the second trial, as shown also by defendant's brief, the witness Snell on direct examination, testified: "Q. Did you see men riding on the foot-board of this engine? A. Yes, sir; they got all the time men on the foot-board behind and in front." On cross-examination he was asked: "Q. Did you tell Mr. Comstock a few minutes ago that they had men on each end? A. Yes; they have got men on each end when they are switching around. Q. What do you mean; each end of the yard or each end of the engine? A. Of the engine. * * * Q. Well, at other times when you see men on the foot-board at each end, what is their business? A. Lookout. Q. Is that what they were there for? A. Yes, sir." The above is, of course, an abbreviation of the testimony of these witnesses. The record contains more from them of similar import.

The burden of defendant's cross-examination seems to have been to get the witnesses to testify that an employee, when riding upon the foot-board of an engine, was not

there for the purpose of warning persons who might be upon the track, but for his own protection. To our minds that is a distinction without a difference. While thus riding to protect himself and the other members of his crew, and his engine also, if he saw a human being upon the track ahead, apparently oblivious of danger, it would make no difference whether he shouted a warning to the one in danger and thus cleared the track, or by signal to the engineer caused the engine to be stopped in time to avoid an accident. As the former of these two courses would be a saving of the time of the entire engine crew, and thus be of greater value to the company it is reasonable at least to suppose that that course would be pursued. However that may be, either course would ordinarily result in preventing an accident. In answer to the question propounded to the witness Langdon, one of the switching crew, "Is the purpose of this man on the end of the car also to give warning to the engineer in case a person or object is on the track in front?" he answered, "Why, yes." It would seem to us to be the duty of the company to require the man on the running-board, if he saw a person upon the track, to shout to that person, and to signal to the engineer. In this case neither was done. If a man had been stationed upon the foot-board on the front of the engine as it was running that day, he in all probability would have seen the deceased in time to have performed this duty, and thus a human life would have been saved, and this litigation avoided.

We think the testimony above outlined was sufficient to take the case to the jury upon the question as to whether or not at that time there existed in the yards of the defendant at Havelock a custom, usually followed, of keeping a man stationed upon the front of a car when a string of cars was being switched, or upon the foot-board on the front end of the engine when it was proceeding forward alone, or upon the foot-board on the rear of the engine when it was backing up, for the purpose not only of "lining up the switches," but for the further double

purpose of signaling to the engineer if any obstruction, whether human or otherwise, was observed upon the track, and also to sound a note of warning to anyone whom they might discover upon the track in a position indicating that that person was oblivious of his danger. If no such custom existed, as these witnesses have testified to, it would have been a very easy matter for the defendant to have shown that fact by a multitude of witnesses. That it did not attempt to do so was a circumstance which the jury would be warranted in taking into account as a tacit corroboration of the testimony introduced by plaintiff. Under the evidence and circumstances above shown, we think it would have been error on the part of the district court to have directed a verdict for the defendant. If so, then the question of defendant's negligence was for the jury. The jury found for plaintiff upon the evidence and circumstances shown, and we do not feel at liberty to disturb their verdict.

It is urged that the amount of the recovery is excessive; but we cannot say that it is so clearly excessive as to warrant us in substituting our judgment for that of the jury and the trial court.

The judgment of the district court is therefore

AFFIRMED.

ROOT, J., took no part in the decision.

LETON, J., dissenting.

I am of the opinion that the evidence is not materially changed from that produced at the former trial and is insufficient to justify the submission to the jury of the question whether the alleged custom existed.

BARNES, J., dissenting.

I cannot concur in the conclusion reached by the majority of my associates in this case. As a ground for a recovery the plaintiff alleged that it was the custom of

the defendant company to station a man upon the foot-board of its engines while switching cars in its yards in order to warn its trackmen to get out of the way of such engines and cars; and that it failed to observe that custom at the time the accident occurred. On this question the burden of proof was upon the plaintiff. As I read the record the plaintiff failed to carry this burden. The majority opinion contains a statement of some of the evidence introduced for that purpose, but not all of it. From this evidence it seems clear that the witness was an unlearned foreigner, unacquainted with the use and meaning of the English language, and failed to comprehend the questions propounded to him on his direct examination; for when matters were explained to him upon his cross-examination he answered squarely that when a member of the switching crew rode upon the foot-board of an engine he did so for the purpose of "lining up the switches." This was the truth of the whole matter, and agrees with that knowledge which is common to all men who have used their ordinary powers of observation. It is well known to every one of ordinary intelligence that in switching cars in railroad yards a member of the switching crew takes his place upon the foot-board of the engine, and thus rides from one switch to another for the sole purpose of throwing such switches as may be necessary when passing from one side track to another. Performing the work in that manner not only saves time, but the unnecessary expense of employing an extra man at every switch target in extensive railroad yards. Again, it is a matter of common knowledge, and has been frequently declared to be the law, that one who takes employment with a railroad company as a trackman assumes the risk arising from the passing of locomotives and trains upon the railroad tracks. In other words, he impliedly agrees that he will keep his own lookout, and get out of the way of passing trains. Notwithstanding this fact, in order to affirm what to my mind is an unjust and illegal judgment, the majority are driven to the

absurd position of holding, as it seems to me, without competent evidence, that it was the custom of the defendant to keep a man upon the foot-board of its engines to warn trackmen in its employ to get out of the way of its passing trains. The absurdity of this matter is apparent when we remember that oftentimes a switch engine is not attached to the front end of a string of cars; that it frequently pushes a string of cars ahead of it in switching operations. If so, how could a person placed upon the foot-board of the engine warn a trackman to get out of the way of such a train?

In the case at bar it was shown that the engine bell was ringing at the time the accident in question occurred. It was also shown that there was a great amount of noise being made by a passing freight train and so it may be said that if a man had been stationed upon the foot-board of the engine in question at the time this accident occurred he could not have made himself heard above the noise of the bell and the passing train so as to have given the deceased any warning at all of the approach of the engine.

Without extending this dissent to any greater length I conclude by saying, that to my mind there is no competent evidence in this record to show the existence of the custom on which the plaintiff must rely in order to sustain the judgment of the trial court, and upon this question I appeal to the record.

It appears that at the close of the testimony the defendant requested the court to direct a verdict in its favor. I am of opinion that the request should have been granted; that it was error to submit the case to the jury, and the judgment of the district court should be reversed.

DIEDRICH H. R. STEINKE, APPELLEE, v. PAULINA DOBSON
ET AL., APPELLANTS.

FILED JANUARY 3, 1912. No. 16,572.

1. **Vendor and Purchaser: EXCHANGE OF LANDS: FRAUD: REMEDIES.** One who has been defrauded in the exchange of property may elect to rescind the contract and return the property which he has received in the exchange, or to retain the property received in exchange and recover damages. He cannot retain the property received in the exchange and in an action for damages establish an equitable lien upon the property which he gave in exchange.
2. **Trial: PROOF OF RELEVANT FACTS.** A fact not itself directly in issue, but relevant to the issue being tried, may be proved without pleading it.
3. **Evidence: LAW OF OTHER STATES.** The common law of a sister state may be proved by "books of reports of cases adjudged in their courts." Code, sec. 420. To prove the law of Missouri, plaintiff offered the decisions of the supreme court of that state in certain cases named, with the pages and volumes in which the decisions are reported; the trial being to the court, it is *held* that this evidence was properly admitted, and, the record showing nothing to the contrary, it will be presumed that the court examined and acted upon these decisions.
4. **Damages: EVIDENCE.** In an action for damages, if the evidence shows substantially that the plaintiff was damaged in at least the amount found by the trial court, the judgment will not be reversed because the exact and full amount of the plaintiff's damages is not definitely shown.

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Affirmed.*

Morning 'd Ledwith, for appellants.

F. A. Boehmer and I. P. Hewitt, contra.

SENGWICK, J.

The plaintiff made an exchange of real estate with the defendants, and in that exchange received from the defendants a warranty deed conveying a tract of land in

Atchison county, Missouri. The deed from the defendants to the plaintiff described the land as the southeast quarter and east half of southwest quarter of section 7 and all of the north fractional half and all of the south fractional half of section 18, all in township 66, range 42, approximating in all 773 acres, subject to incumbrance of \$5,750. The plaintiff alleged in his petition that the defendants agreed to convey to him 773 acres, and that the land described in the deed is in fact only 545 acres, being 228 acres less than the amount of land agreed by the defendants to be conveyed; that the agreed price and value of the land was \$50 an acre, and that the plaintiff was damaged in the sum of \$12,200. The case was tried by the court without a jury, and the court found generally for the plaintiff, assessing his damages at \$3,000, and entered a judgment accordingly. From this finding and judgment both parties have appealed to this court.

1. The plaintiff, after alleging the shortage in the land, alleged that the defendants still have a part of the land which was conveyed to them by the plaintiff in the exchange, and that other parts of the land so conveyed had been conveyed by the defendants to other parties in exchange for certain specified real estate described in the petition, and the plaintiff asked for a judgment for damages, and that the same be declared a lien upon the lands conveyed to the defendants in the said exchange and also upon the lands which the defendants had received in exchange for the lands so conveyed to them by the plaintiff. The trial court found that the plaintiff could not enforce a lien upon the lands of the defendants in this action for damages, and the plaintiff now complains of this action of the trial court. We think this finding of the trial court is right. If the plaintiff was defrauded in the exchange, as alleged, he might rescind the contract of exchange and return the property received by him and insist upon the return of the property which he had conveyed in the exchange; or the plaintiff might keep the property which

he had received and bring his action at law for the damages which he had sustained. He chose the latter course, and could not in such an action enforce the return of the property which he had conveyed to the defendants or establish a lien thereon.

2. The defendants insist that they conveyed to the plaintiff the full amount of land agreed upon, and that therefore the plaintiff was not entitled to recover any damages whatever. The land in question lies along the Missouri river. In times past there have been great changes in the banks of the Missouri river along the boundary of this land. There was a large amount of evidence taken. Several surveys have been made of the line of this land along the bank of the river, and the evidence is somewhat conflicting and mystifying as to where the true boundary of the land is. The defendants insist that the land extends to the thread of the stream, and it appears that, if it should be so found, the tract contains nearly, if not quite, the full number of acres specified in the deed. The plaintiff insists that the defendants did not have title beyond the river bank. If this contention of the plaintiff is sustained the tract does not contain the number of acres contracted to be conveyed within something like 200 acres. The question arose upon the trial as to whether, under the law of Missouri, riparian land on a navigable stream extends to the thread of the stream or only to the bank.

The record recites the following: "The plaintiff now offers in evidence the decisions of the supreme court of the state of Missouri in the following cases"—naming *Rees v. McDaniel*, 115 Mo. 145, *Hahn v. Dawson*, 134 Mo. 581, *Frank v. Goddin*, 193 Mo. 390, and other decisions of the supreme court of that state. The defendants objected to the offer "as incompetent, immaterial and irrelevant, and no foundation laid, and nothing in the petition to warrant the introduction of this kind of evidence, this issue not being tendered by the pleadings, and hearsay evidence." The objection was overruled, and the defend-

ants excepted. None of the decisions in the cases cited appears in the record, nor does the statute mentioned in the offer. It is contended that it is not sufficiently proved that the law of Missouri limits riparian ownership of land to the bank of the river, and that the court should have found that the defendants had title to the thread of the stream as they might under the law of this state, and that the deed conveyed that title to the plaintiff.

It is contended that the evidence was incompetent because the law of Missouri was not alleged in the petition. The issue being tried was whether the tract of land conveyed by the deed contained the number of acres represented. The land was described by government divisions and fractions thereof. The evidence showed that these subdivisions lay next to the river, and that the land lying outside of the river and within these subdivisions did not comply with the terms of the deed and the representations of the defendants. The defendants then offered evidence tending to show that if the lines of these subdivisions were extended to the thread of the stream they would include the number of acres specified in the deed. The plaintiff in rebuttal offered the evidence as above recited. In this condition of the pleadings and evidence, we think it was not an abuse of discretion on the part of the trial court to allow this rebutting evidence. The ultimate fact to be established was the quantity of land actually conveyed by the deed. If the defendants had no title to that part of the land lying in the river they could not convey it. If, under the law of Missouri, the defendants could not have title to this land, that was a fact relevant to the question in issue, but was not itself directly in issue. This was substantially the same condition as existed in *Barber v. Hildebrand*, 42 Neb. 400, in which it was necessary to show title in land as a fact relative to the issue being tried. The action was to recover commission as a real estate agent, and there was no allegation in the pleadings as to the title of the land, nor as to the law of Iowa, but the court held that evidence in regard to the

law of Iowa was proper as bearing upon the question of title, and said: "Wright's property was in Iowa. The law of Iowa determined his title. The law of Iowa, as applicable to the facts shown by the abstract, was a fact in this case and, except as to statute at least, the proper subject of expert testimony."

We think also the evidence was competent and properly admitted. Section 420 of the code provides: "The unwritten law of any other state or government may be proved as fact by parol evidence, and also by the books of reports of cases adjudged in their courts." The record shows that decisions of the supreme court of Missouri as found in well-known books of authority were received in evidence by the court. These decisions show that in Missouri the defendants could not own the land lying in the bed of the river. It is true that the bill of exceptions is defective in not containing these decisions. It would, however, be highly technical to assume that the trial court did not see and predicate his decision on these authorities, or to refuse to take notice of the authorities referred to as containing the law of that state.

It being established then that the defendants did not have title, and could not and did not convey to the plaintiff the amount of land agreed upon and described in the deed, it follows that the plaintiff has been damaged and is entitled to recover in this action.

It is objected that the evidence is not definite and certain as to the number of acres for which the plaintiff is entitled to recover, nor as to the value of the land. There is substantial evidence, however, as already indicated, that the land actually conveyed to the plaintiff was from 175 to 200 acres less than the amount agreed upon, and the evidence as to the value is that the parties considered and agreed in their exchange that the land to be conveyed to the plaintiff was of the value of \$50 an acre. The court did not consider this land to be of equal value with that actually conveyed, but apparently estimated the plaintiff's damages from a consideration of all the lands conveyed and agreed to be conveyed.

Antelope County Bank v. Wright.

This finding of the court is not so clearly wrong as to justify a reversal of the judgment.

AFFIRMED.

REESE, C. J., took no part in the decision.

ANTELOPE COUNTY BANK, APPELLEE, v. CHARLES WRIGHT,
APPELLANT.

FILED JANUARY 3, 1912. No. 16,588.

Notes: ACTION: PARTIES. The holder of a promissory note for collection may maintain an action thereon in his own name, if the note is duly indorsed in blank by the payee named therein.

APPEAL from the district court for Antelope county:
ANSON A. WELCH, JUDGE. *Affirmed.*

J. B. Smith, for appellant.

J. F. Boyd, contra.

SEDGWICK, J.

The plaintiff recovered a judgment against the defendant in the district court for Antelope county upon a promissory note. The trial court, after the evidence was concluded, instructed the jury to return a verdict for the plaintiff, which was done and judgment entered thereon. The defendant has appealed.

The only error assigned in the brief is that the evidence as to the plaintiff's ownership of the note is conflicting, and that the question should have been submitted to the jury as to whether the plaintiff is the real party in interest. The note is dated April 24, 1896, and is in the ordinary form; was in the possession of the plaintiff and presented at the trial and received in evidence on behalf

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of the plaintiff. One W. W. Hobbs is named as payee in the note, and his indorsement appears on the back of the note. The president and cashier of the plaintiff bank both testified that this was the genuine indorsement of the payee, Hobbs, and that the note was the property of the bank. The defendant produced several witnesses who testified that they had seen and examined the note some five months after the date of the note and some time before the note became due, and that it then had no indorsement on the back thereof, and that the president of the bank then told the witnesses that the bank was not the owner of the note, but held the note for collection. In this condition of the evidence the court did right in instructing the jury to find for the plaintiff. If the bank held the note for collection it might maintain an action in its own name for that purpose. Comp. St. 1911, ch. 41, secs. 36, 37; *Roberts v. Snow*, 27 Neb. 425. See, also, *Meadowcraft v. Walsh*, 15 Mont. 544, 39 Pac. 914; *United States Nat. Bank v. Geer*, 53 Neb. 67, 55 Neb. 462.

The judgment of the district court is

AFFIRMED.

IN RE ESTATE OF WILLIAM HOPPER.

WILLIAM C. HOPPER ET AL., APPELLEES, v. DANIEL G. HOPPER, APPELLANT.

FILED JANUARY 3, 1912. No. 16,605.

1. **WILLS: PROBATE: EXECUTION: EVIDENCE.** If an instrument purporting to be the will of a deceased person is offered for probate and is signed by the decedent and by two or more persons as witnesses, oral evidence is admissible to prove the circumstances surrounding the execution of the instrument, and that it was in fact executed by the decedent as his will, and that the provisions of the statute in regard to the formal execution of a will were complied with.
2. ———: **INCLUSION OF WRITING BY REFERENCE.** A writing in existence at the time of executing a will, or made at the same time

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and as part of the same transaction, may, by reference, be made a part of the will, if it is described and fully identified by the terms of the will itself.

3. ———: ———: PAROL EVIDENCE. Oral evidence is competent to prove the signatures of witnesses who signed such writing referred to in the will and made a part thereof, and to prove that the writing offered is the same instrument so identified by the signatures of such witnesses.
4. ———: ———: DEVISE: VALIDITY. Certain lands, and the intended devisees, were fully specified and described in deeds executed with the will; these deeds were described and identified in the will and duly witnessed and deposited with the will as a part thereof. The will provided that the lands so deeded to the said grantees therein "shall be held and possessed by them thereafter (after the death of testator) absolutely in fee simple." Held a valid devise of the lands so described to the grantees so named.

APPEAL from the district court for Douglas county:
HOWARD KENNEDY, JUDGE. *Affirmed.*

Smyth, Smith & Schall, for appellant.

Baldrige, De Bord & Fradenburg, contra.

SEDGWICK, J.

An appeal was taken to the district court for Douglas county in the matter of probating a will as the last will of William Hopper, deceased. Upon a trial in that court the will was admitted to probate, and the contestant has appealed.

There were offered, as the will of the deceased, nine several exhibits, the first being a document executed in the ordinary form prescribed by statute for the execution of wills; the second to seventh documents, inclusive, being in form warranty deeds, executed by William Hopper, as grantor, to each of six of his children, respectively, as grantees, and each in form conveying certain real estate to each of the said six children, respectively. Two of said exhibits were executed as codicils to the will of the deceased. The contention is that these six documents

in the form of warranty deeds do not constitute a part of the will and were improperly admitted to probate as such. The case was tried to the court without a jury, and much of the evidence was received under objections that it was incompetent, and many of the questions so presented are reserved and discussed in the briefs. Without discussing these numerous assignments in detail, it is perhaps sufficient to say: First, oral evidence is incompetent to contradict or vary the express terms of any of these written documents; second, oral evidence is competent to explain ambiguous, or otherwise unintelligible, terms and expressions in these documents; third, if a document is offered as the will of a decedent and is signed by the decedent and by two or more competent persons as witnesses, oral evidence is competent to show the circumstances surrounding the execution of the document, and that it was in fact executed by the decedent as his will, and that the provisions of the statute in regard to the manner of its execution were complied with. *Williams v. Miles*, 68 Neb. 463. It may be further observed that some of the examination of witnesses that was objected to was competent for the purpose of showing the knowledge that the witness had in regard to the transaction and his competency as a witness.

It appears that the deceased left nine children and heirs surviving him, and that he desired and intended to divide his property equally among them, so far as was practicable under the existing conditions. He considered that the husband of one of his daughters was irresponsible, and he desired to place the property given to that daughter beyond the reach of her husband. It is not necessary to state the details of his plan to carry out this intention. It resulted in his making specific devises and bequests to this daughter and to one of his sons. To each of his seven other children he executed a deed of real estate as above stated. The eighth paragraph of the first document referred to is as follows: "I have made and executed conveyances by warranty deed of certain of my

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remaining lands in Douglas county, Nebraska (not above devised to my two children, Daniel Gilbert Hopper and Lomila McLean) to my other seven children giving to each an equal amount of land in value as near as I am able to estimate the same and said seven deeds to said seven children, to wit: Mary Jane Witte, Bryan B. Hopper, Hanna Crook, Sarah Ellen Spicer, Alice Walsh and William Charles Hopper are hereby delivered to said trustees who are hereafter named as my executors of this my last will and testament and are deposited with this will with the county judge of Douglas county, Nebraska. I direct that upon my death and as soon and immediately after said executors shall be appointed by the county court of said county and have qualified as such executors, said executors hereby made trustees for that purpose shall deliver the said deeds above mentioned to the said grantees therein severally named and that the lands so deeded to said seven children shall be held and possessed by them thereafter absolutely in fee simple. Having in that manner provided for said seven children no specific bequests are made to them hereby."

The seven deeds to each of seven of his children were executed as stated in this paragraph, but in reciting the names of the seven children the name of his daughter Eliza M. Deerson was omitted. This the evidence shows was a mere oversight of the writer of the will. These seven deeds and the principal document describing them were prepared and executed at the same time. Mr. Seymour M. Sadler prepared these documents at the request of the deceased, and also signed them as a witness, together with Mr. Cooper and Mr. Mayne. The deeds were witnessed by Mr. Sadler and Mr. Cooper; and Mr. Mayne, who was a notary public, took the acknowledgment and signed the deed in his capacity as notary public. When these persons were called to witness the will, these several documents were together on the table before the deceased. Two of these witnesses testified that the deceased told them that these papers were his will. Mr. Mayne

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does not remember whether the witnesses used that particular expression, but they all agree that they were requested to witness the will of the deceased, and for that purpose they signed all of these documents as witnesses. The deceased first signed all of the documents, and afterwards each of the witnesses signed them all in his presence and in the presence of each other.

Afterwards, the deceased made two several changes in his will by codicil. In the first codicil he recites that he has made other provisions for one of his sons, and he has therefore canceled and destroyed the deed to that son "mentioned in clause No. 8 of said will," and he reaffirms said clause No. 8 "as to the six (6) deeds therein referred to." In the second codicil he makes still another change as to the devise to the same son referred to in the first codicil, but makes no other change in the terms of his will. All of these documents as constituting his will were kept together and by the deceased deposited with the probate court. The six deeds admitted as a part of the will and now being contested were all, as has been seen, executed at the same time with the main document of the will. They were all in existence at the time the will was completed and at the time of the death of the decedent, and were identified beyond question by the signatures of the witnesses and by their oral testimony at the trial. They specify and truly describe the property given to each of the devisees respectively. The language of the eighth paragraph of the will quoted above, "upon my death * * * said executors hereby made trustees for that purpose shall deliver the said deeds above mentioned to the said grantees therein severally named and that the lands so deeded to said seven children shall be held and possessed by them thereafter absolutely in fee simple," is sufficient, when construed with all of the other provisions of the will, to devise the lands specifically identified and described in the documents executed with and a part of the will. Various expressions contained in the will and in the codicils, and circumstances surrounding

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the execution of the will are referred to by the contestant as showing that it was the intention of the decedent to transfer the title of these lands by the deeds themselves as such, and not as a part of his will, and it is argued that the deeds by themselves are not a compliance with the statute in regard to the execution of wills and, not having been delivered to the grantees in the lifetime of the decedent, are ineffectual to pass the title. We are satisfied, however, that the will cannot be so construed. It is manifest that these papers together were intended and executed by the deceased as his will, and that the witnesses so understood it from the declarations of the deceased, and so signed these documents as such witnesses at the request of the deceased and in substantial compliance with the provisions of the statute.

The judgment of the district court admitting this will to probate is amply supported, and is

AFFIRMED.

E. L. KIRK, APPELLANT, V. STATE BOARD OF IRRIGATION,
APPELLEE.

FILED JANUARY 3, 1912. No. 17,008.

1. **WATERS: CONTROL OF BY STATE.** In this state, the water of running streams is *publici juris*; its beneficial use belongs to the public and is controlled by the state in its sovereign capacity.
2. ———: **APPROPRIATION BY RIPARIAN OWNERS.** Riparian owners cannot appropriate the water of running streams without the permission of the state.
3. ———: ———: **REGULATION BY STATE.** If the state grants the right to appropriate the waters of its running streams for beneficial use, it may do so under such limitations and conditions as it finds to be necessary and proper to subserve the public welfare.
4. ———: ———: **USE CONFINED TO STATE: INTERFERENCE WITH INTER-STATE COMMERCE.** In granting the right to appropriate water of a running stream for power purposes, it is within the discretion of the state, through its proper officers, to limit the rights granted

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so as to prevent the transmission or use of the power beyond the confines of the state. Such limitation does not violate the federal constitution as interfering with interstate commerce.

5. ———: ———: CONTROL OF STATE BOARD OF IRRIGATION. The state board of irrigation, highways and drainage, in acting upon an application for the appropriation of the waters of the state, is given a reasonable discretion to so limit the grant that it will not be detrimental to the public welfare.

APPEAL from the district court for Knox county:
ANSON A. WELCH, JUDGE. *Affirmed.*

E. A. Houston and *W. A. Meserve*, for appellant.

Grant G. Martin, Attorney General, and *Frank E. Edgerton*, contra.

SEDGWICK, J.

The appellant filed with the state board of irrigation an application for a permit to appropriate the waters of the Niobrara river for power purposes. The state board of irrigation indorsed its approval upon the application, and in that indorsement specified certain limitations and conditions of the approval. Among those specifications of limitations and conditions was the following: "(7) This grant is made subject to the provisions of section 42, article 2, of the Nebraska Irrigation Law, and power generated under and by virtue of this permit must not be transmitted or used beyond the confines of the state of Nebraska." The section of the statute referred to in this specification is as follows: "The water of every natural stream not heretofore appropriated, within the state of Nebraska, is hereby declared to be the property of the public, and is dedicated to the use of the people of the state, subject to appropriation as hereinbefore provided." Comp. St. 1911, ch. 93a, art. II, sec. 42. The applicant appealed to the district court for Knox county, complaining of this seventh paragraph of the limitations and conditions of his grant. Upon a hearing in that court the

action of the state board of irrigation in this particular was approved and the appeal therefrom was dismissed, and the applicant appealed to this court.

1. It is contended that this order ought to be reversed because: First, it is invalid as interfering with interstate commerce; second, the state board of irrigation has not been given power or authority by the state to impose such conditions and limitations.

In *Manufacturers Gas and Oil Co. v. Indiana Natural Gas and Oil Co.*, 155 Ind. 545, the supreme court of that state held that the statute, which attempted to "prohibit the owner of natural gas from transporting the same by safe methods out of the state, contravenes the federal constitution relating to interstate commerce, and is void, since natural gas, when reduced to possession, is an article of commerce." The defendant was taking natural gas from its own wells on its own land, and the action was brought to enjoin it from transporting this gas through pipes to any point without the state. The statute considered provided: "It shall be unlawful for any person or persons, company, corporation or voluntary association to pipe or conduct natural gas from any point within this state to any point or place without this state." This statute was held to violate the federal constitution by interfering with interstate commerce. The decision was put upon the ground that the gas, as well as the land from which it was taken, was the property of the defendant, and that the state, representing the public, had no property interest or rights therein. The court distinguishes the case from *Geer v. Connecticut*, 161 U. S. 519, and in doing so used this language: "In the case of wild animals, before they are reduced to possession, the ownership is in the public, and not in any private person, and they are, therefore, held to be subject to the protection of the sovereign. The privilege of taking, killing, and transporting them may, on this ground, be regulated by the legislature. As to natural gas, however, the public has no title to or control over the gas in the ground. On the

contrary, so far as it is susceptible of ownership it belongs to the owners of the superincumbent lands in common, or, at least, such landowners have a limited and qualified ownership in it to the entire exclusion of the public." In *Geer v. Connecticut, supra*, the supreme court of the United States held that the statute of Connecticut prohibiting the transportation of game outside of the state, although the game was lawfully killed within the open season, was not affected by the interstate commerce clause of the federal constitution, and that the ownership of the wild game within the limits of a state, so far as it is capable of ownership, is in the state for the benefit of all its people in common. The court said that, the ownership of wild game being in the state so far as it was capable of ownership, the state might transfer the full ownership thereof to a citizen, or a qualified ownership, as the state saw fit, and that the effect of the Connecticut statute was to transfer limited or qualified ownership of game to one who took such game in the open season, and to reserve such ownership as would enable the state to prevent the removal thereof from the state. The opinion was by Mr. Justice White (the present Chief Justice), and was concurred in by a bare majority of the court, two of the justices of the court being absent, and Justices Field and Harlan dissenting. The ground of their dissent, as stated in the opinion of Mr. Justice Field, appears to be that "animals within a state, whether living in its waters or in the air above, are, at the time, beyond the reach or control of man, so that they cannot be subjected to his use or that of the state in any respect; they are not the property of the state or of any one in a proper sense. * * * A bird may fly at such height as to be beyond the reach of man or his skill, and no one can then assert any right of property in such bird; it cannot then be said to belong to any one." If the state never had and could not have any property in or power of disposition of wild animals, taken with the consent of the state in the open season, it would not transfer any

right of property to the defendant, and therefore would not and could not reserve any interest therein or control over the same. We understand that if it had been considered by the dissenting justices that the state had or acquired ownership of wild game so taken, or the right to control the same as property, they would also have held that it might have reserved such an interest therein as to enable it to prevent its transfer without the state. The opinion of the court, at least, was that, when a state has an interest in or control over property within its limits, it may transfer a qualified ownership, and prevent the transportation of the property without the state. We are concluded by opinions of that court upon federal questions, and we may be allowed to say that, if we were not so concluded, the reasoning of the opinion would control our judgment.

In this state, running water is *publici juris*. Its use belongs to the public and is controlled by the state in its sovereign capacity. *Meng v. Coffee*, 67 Neb. 500. A riparian proprietor cannot appropriate it without permission of the state. This state then has such a proprietary interest in the running water of its streams and in the beneficial use thereof that it may transfer a qualified ownership or right of use thereof. When it grants such ownership or right of use it may impose such limitations and conditions as its public policy demands. Under such circumstances the state may reserve such a right of ownership and control of the beneficial use of the running waters of the streams as will enable it to prohibit the transmission or use thereof beyond the confines of the state.

2. Has the state granted to the state board of irrigation power to impose such conditions upon the appropriation of the water of its streams to beneficial use? We think there is no doubt of the power and duty of the state board of irrigation to determine such questions. "If there is unappropriated water in the source of supply named in the application, and if such appropriation is

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not otherwise detrimental to the public welfare, the state board, through its secretary, shall approve the same." Comp. St. 1911, ch. 93a, art. II, sec. 28. Thus the state board of irrigation is made the guardian of the public welfare in the appropriation of the public waters of the state, and this necessarily devolves upon that board a large discretion in such matters. If the public welfare demands it, they may grant a qualified and limited right of appropriation and in the beneficial use of the water so appropriated.

We think that the board has not exceeded its powers in the order complained of, and the judgment of the district court dismissing the appeal is

AFFIRMED.

SIDNEY S. MONTGOMERY, APPELLANT, v. QUINTILLA M. DRESHER, APPELLEE.

FILED JANUARY 24, 1912. No. 16,575.

1. **Contracts: ABOLITION OF PRIVATE SEALS.** Since the use of private seals has been abolished in this state, all contracts are upon the same footing as simple contracts.
2. **Alteration of Instruments: FILLING BLANKS.** The filling of blanks in a written instrument is not, strictly speaking, an alteration of the instrument. Where a blank is filled in after the execution and delivery of a written instrument, it is a question of authority so to do.
3. ———: ———. The right to fill blanks in written instruments after execution and delivery is based upon an assumption of consent, in the absence of specific instructions, and the leaving of such blanks is considered to imply authority to fill them, and creates an agency in the receiver to do so in the way contemplated by the maker.
4. **Mortgages: VALIDITY: INSERTION OF NAME OF MORTGAGEE.** Where a mortgage was executed with the blanks for the name of the mortgagee unfilled, the mortgage delivered to the person to whom the indebtedness secured by the mortgage ran, the filling in of his own name by such person would not invalidate the mortgage.

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5. ———: **BONA FIDE PURCHASERS: EVIDENCE.** Upon an examination of the evidence, it is found that plaintiff is a *bona fide* purchaser of the notes and mortgage sued upon.

APPEAL from the district court for Douglas county:
LEE S. ESTELLE, JUDGE. *Reversed with directions.*

William Baird & Sons, for appellant.

Duncan M. Vinsonhaler, contra.

REESE, C. J.

This is an action to foreclose a mortgage on lot 17, in block 2, in Hanscom Place, an addition to the city of Omaha. The petition is in the usual form, and is based upon two promissory notes, each bearing date December 31, 1907—one for \$500, due January 1, 1909, the other for \$1,200, due January 1, 1910—secured by the mortgage set out in the petition, all issued to one Becker and indorsed and assigned to plaintiff. The answer consists of (1) a general denial of all unadmitted facts alleged in the petition; and (2) alleges the perpetration of a fraud upon defendant by Becker in the exchange of properties by fraudulently misrepresenting the quality, character and value of the property involved in this action, and for the price of which the notes described in the petition were in part given; that the notes and mortgage when executed did not contain the name of Anson E. Becker, as payee and grantee, and that they have been changed and altered after delivery by the insertion of Becker's name therein where they were left blank at the time of execution and delivery; that defendant would not have signed the same had his (Becker's) name been there. The averment in the petition that plaintiff is a *bona fide* owner and holder of said notes and mortgage is also denied; and it is alleged that he had full knowledge of their defects when executed, that they were without consideration, that he is not the owner thereof, and his pretended purchase of them was the carrying out of a fraudulent conspiracy, entered into

with the said Becker, to aid in the perpetration of a further fraud upon her. There are other averments in the answer which it is not deemed necessary to notice here. By the reply plaintiff denied any knowledge of the exchange of property as alleged in the answer, or of any fraud therein, or that the name of the payee and mortgagee had been inserted after delivery; averred that the filling of the blanks therein by the insertion of Becker's name was by the authority of defendant, that plaintiff was a *bona fide* holder and owner thereof by their purchase for value before the maturity of the notes. Other averments of this reply need not be here noticed. There was a trial to the district court, which resulted in a finding and decree in favor of defendant, dismissing plaintiff's petition, canceling the mortgage, and quieting defendant's title. The findings of the decree are to the effect that plaintiff did not acquire the notes and mortgage for a valuable consideration in the due course of business, that there had been a material alteration in the mortgage subsequent to its execution and delivery, and that the mortgage casts a cloud on defendant's title which she is entitled to have removed and her title quieted. A decree was accordingly rendered. The decree provides that it is without prejudice to plaintiff's right of action on the notes, but no judgment is rendered thereon. Plaintiff appeals.

From an examination of the evidence contained in the bill of exceptions, we conclude there are but three controlling questions involved in this case. (1) Was the insertion of the name of Becker as payee of the notes and grantee in the mortgage a material alteration of said instruments? (2) If so, were the blanks so filled by the authority and consent of defendant? (3) Is plaintiff a *bona fide* holder of said instruments?

Since the use of private seals has been abolished in this state (Ann. St. 1911, sec. 11851) all contracts are upon the same footing as simple contracts. Therefore, the same rule should be applied to all. The filling in of a

blank in a written instrument is not, strictly speaking, an alteration of the instrument. Where a blank is filled in, it is a question of authority so to do. *Waldron v. Young*, 56 Tenn. 777. The right to fill in blanks in written instruments is based upon an assumption of consent. The leaving of a blank space is considered to imply authority to fill it. *Inhabitants of South Berwick v. Huntress*, 53 Me. 89; *Smith v. Crooker*, 5 Mass. *538; *New England Loan & Trust Co. v. Brown*, 59 Mo. App. 461; *Porter v. Hardy*, 10 N. Dak. 551. In *New England Loan & Trust Co. v. Brown*, *supra*, it is said, quoting from *Mackey v. Basil*, 50 Mo. App. 190: "The rule of law is now everywhere well settled that the leaving of blanks in a contract, and the delivery of the instrument with such blanks, creates an agency in the receiver to fill the blanks in the way contemplated by the maker. The authority to fill in the blanks will be implied"—citing a number of cases and authorities. See, also, *Augustine v. Schmitz*, 145 Ia. 591; *Chapman v. Veach*, 32 Kan. 167, 4 Pac. 100; *Field v. Stagg*, 52 Mo. 534; *Pence v. Arbuckle*, 22 Minn. 417; *Van Etta v. Evenson*, 28 Wis. 33; 2 Reeves, Real Property, sec. 1085 *et seq.*; *Roe v. Town Mutual Fire Ins. Co.*, 78 Mo. App. 452; *Ragsdale v. Robinson*, 48 Tex. 379; *McClain v. McClain and Davenport*, 52 Ia. 272. There are many cases holding to a different doctrine, but we are persuaded that the more modern holdings are more reasonable, and more consistent with justice, viz., that the executing and delivery of a mortgage with the name of the mortgagee left blank is an implied authority to the person to whom the delivery is made to fill the blank with the name of the proper mortgagee, where no fraud or violation of instructions can be shown.

In this case the person whose name was entered in the blank space was the identical person with whom defendant was dealing and whose name would naturally have been written in the blanks. The reason, as explained by Becker, for the omission was that as Bennett was a part owner of the real estate transferred to defendant, and on

which the mortgage was given, he desired to consult him before filling the blanks. This explanation was reasonable and may be correct. At any rate, the mortgage as filled out corresponded with the dealings between the parties to the transaction, and should be held to be a valid mortgage, even as between the parties to it. The right to fill the blanks in the notes by the insertion of the name of the payee is given by section 9213, Ann. St. 1911 (Comp. St. 1911, ch. 41, sec. 14), and their validity cannot be questioned. In addition to the implied authority to fill the blanks in the notes and the mortgage, the evidence strongly preponderates in favor of an express authority therefor and consent thereto by defendant.

Is plaintiff a *bona fide* holder of the notes and mortgage? Courts are required to decide causes upon the evidence. Plaintiff testified that he purchased the notes and mortgage in good faith, for value, before maturity, and without any knowledge of the previous transactions between the parties or notice of any defense defendant might have; that the price paid was \$1,600, which was within \$100 of the face of the notes. Plaintiff's check for the sum of \$2,000, payable to W. V. Bennett, from whom the purchase was said to have been made, was introduced in evidence, and the testimony of plaintiff and Bennett was that \$400 was to be applied on an indebtedness to Bennett from plaintiff, and the remaining \$1,600 to the purchase price of the notes and mortgage. The check bears date January 17, 1908, which was before the maturity of the notes, and is indorsed by Bennett and stamped "Paid." Bennett testified that he received the money, and plaintiff swore that the check was returned to him by the bank canceled. There was some delay in the indorsement of the notes and assignment of the mortgage, but that was explained by evidence that Becker had assigned the mortgage to Bennett, and that he was out of the country temporarily, and it was deemed best to await his return, when the assignment to Bennett could be taken up and one made to plaintiff, thus saving recorder's

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fees. The notes are indorsed by Becker to Bennett "without recourse"; but, as Bennett was already the owner of a half interest in them, the indorsement, of itself, cannot be held as evidence of unfair dealing or of fraud. True, a relationship by marriage was shown to exist between plaintiff and Bennett, but this circumstance alone does not conclusively show the absence of *bona fides* in the purchase of the notes.

We are not unmindful of the charges of fraud made by defendant as against Becker and Bennett in the exchange of properties which gave rise to the execution of the notes and mortgage, and which may be well founded, yet we are unable to see how the facts alleged can, under the evidence, have any controlling effect upon this case. That subject is therefore not discussed. Since section 681a of the code requires this court to try questions of fact *de novo* and "reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court," etc., we conclude that the evidence supports the *bona fides* of plaintiff's purchase of the notes and mortgage, and that he is entitled to a decree foreclosing his mortgage.

The decree of the district court is therefore reversed and the cause remanded to that court, with directions to enter a decree of foreclosure.

REVERSED.

NORA SHANAHAN, ADMINISTRATRIX, APPELLEE, v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, APPELLANT.

FILED JANUARY 24, 1912. No. 16,578.

Carriers: INJURY TO PASSENGER: EVIDENCE: INSTRUCTION. Plaintiff's intestate took passage on a through-freight train from a point in Iowa to a point in this state, accompanying live stock and household goods, traveling in the car as a caretaker. When the train

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came to the city of H., in this state, the car was detached and placed on a proper side-track in the track yards, to be taken to its destination by a local train the next morning, the through freight not stopping at the point of destination. During the intervening night deceased sought his car, and there was some evidence tending to show that he found it, and afterward left it and was found in a fatally injured condition by the side of the main-line track, a considerable distance from his car. At about the hour of 2 o'clock A. M. a fast passenger train came in from the west, running at the rate of 25 to 35 miles an hour. The fireman on the engine saw an object about 140 feet ahead of the train, outside of the track and on his side thereof, but was unable to detect what it was. As the engine passed it, it assumed the shape and form of a human being, but lying outside and free from the track. After the train had passed on to the station, he informed defendant's employees of what he had seen, and they went to the spot and found deceased injured and lying outside of, but near, the track. The defendant asked the court to instruct the jury, in substance, that if they found that deceased reached his car, and afterward left it and wandered upon the tracks and placed himself on the ground near enough to the main-line track to be injured by a passing train, he would be a trespasser, and the enginemmen were not bound to expect his presence there, nor look out with a view to discover him, and the defendant would not be liable for not stopping the train before passing him. *Held* error to refuse such instruction.

APPEAL from the district court for Kearney county:
HARRY S. DUNGAN, JUDGE. *Reversed.*

James E. Kelby and Frank E. Bishop, for appellant.

R. A. Batty, W. D. Oldham and Adams & Adams, contra.

REESE, C. J.

This action is for damages resulting from the death of plaintiff's intestate, which is alleged to have been caused by the negligence of defendant. Plaintiff recovered a judgment. Defendant appeals.

The uncontroverted facts may be stated to be that Thomas E. Shanahan, the deceased, was a passenger on a freight train from Coburg, in the state of Iowa, to the

village of Axtell, in this state; that his right to travel on a freight train grew out of a contract with defendant for the shipment of a car-load of property, consisting in part of a horse, and household furniture, and by reason thereof he remained with the car for the purpose of caring for the shipment. The car was placed in a fast through-freight train which did not stop at Axtell, and when it arrived at Hastings in the afternoon it was cut off the train and sidetracked, to be picked up and carried forward by a local train the next morning. The track yards at Hastings are large, and the car was placed upon a track remote from that of the main line. The deceased left the car in the evening and went into the city, remaining there until about the middle of the night, when he attempted to return to his car. In his effort to do so he sought the assistance of the yardmaster of the track yards, who directed him how to reach his car. There is some evidence tending to prove that he was, to some extent, under the influence of liquor, but that is not deemed material to the inquiry as to the giving or refusing of the instruction hereinafter set out. When directed as to the location of the car he requested the yardmaster to accompany him thereto, but the yardmaster being busy declined to do so. So far as is shown by the evidence, this was the last seen of him until about 2 o'clock the next morning, when the through-passenger train came in. This train was running rapidly—at the rate of from 25 to 35 miles an hour. The fireman was called as a witness by the plaintiff, and testified that, upon looking ahead of the train from the window on his side of the cars, he saw some object by the side of the track and outside of the rails some 140 to 150 feet ahead, which he took to be a pile of cinders, or a drawhead, but as the engine passed it he thought it assumed the form of a man, lying with the head near the end of the ties and the feet away from the track, the body lying perpendicular to the track. This was probably a mile from the station. When the train arrived at the station, he informed the employees of de-

findant of what he had seen, when a switch engine was run out, and the deceased found, yet living, but badly injured, his feet being toward the track, and without any coat on or about him. One of defendant's employees was left with him until an improvised stretcher—a grain door—was procured, when he was taken to the station, and an ambulance or a conveyance was called, when, with the surgeons in attendance upon him, he was removed to a hospital and died the next day. Upon an examination of his clothing, it was found that one of his trousers pockets was drawn from its place and turned inside out. His pocket-book, containing a sum of money, was found on the opposite side of the track from where he was lying, but appears not to have been otherwise molested. How, or by what means, the pocket was turned and the pocket-book placed where it was found is not known. At the time he entered the yards he had with him a coat, and protruding from the pockets of which, it is said, were two beer bottles. Two broken beer bottles were found near where he was lying. On the examination of his car the next morning, a coat answering the general description of the one he had when entering the track yards was found hanging therein, and his cot appeared prepared for occupancy, but had not been occupied. A number of empty beer bottles were found in the car. His injury consisted in part of one of his legs being crushed or cut off, as though run over by a car wheel. If the plaintiff's principal witness, the fireman on the train, was not mistaken, it seems improbable that the injury could have been caused by that train, unless deceased, in an effort to rise, had cast himself upon the track and thus brought himself in front of the rapidly moving wheels of the train; but there is no evidence of such an effort, and he was under the eye of the fireman from the time he was first seen until the engine had passed him. He had been hurt before that train reached him, or the injury must have been caused in some way by the cars following the engine. The above is substantially a correct statement of the facts,

but without detail as to the evidence, as it is not our purpose to review it. It is claimed that defendant was negligent in not accompanying deceased to his car, and in not caring for him after discovering him, as he should have been cared for. But these questions need not be discussed here.

Defendant asked the court to give instruction numbered 9, of those asked by it, but which the court refused to give. It is as follows: "The jury are instructed that if Thomas Shanahan went to his car, or put his coat in the car, after he had been directed to it by the yardmaster, and after that wandered away from the car over to the main-line track where he lay upon the ground dangerously near to or in the way of the train passing on that track, then in that position he was a trespasser, and the enginemen were not bound to expect his presence there, nor to look out with a view to discover him, and the defendant is not liable because the train could not be or was not stopped before reaching and passing him." There was some evidence which tended to prove, inferentially, that deceased had found and entered his car after meeting the yardmaster. If this were true, it would eliminate all claim of negligence on the part of the yardmaster in not accompanying Shanahan to his car. Also, if this were true, it would terminate all obligation and responsibility of the defendant to him as a passenger. The relation of carrier and passenger, as between them, would not exist, for the reason that, by leaving his car and going upon the tracks, he would be acting upon his own volition disconnected with his carriage, and would, in that sense, be a trespasser. True, he had the right, as such passenger, to be within the track yards, but as such only in connection with his car and the care of his property therein. Then if he wandered away from his car over to the main-line track, which was shown to be quite a distance from his car, where he lay upon the ground dangerously near to the track, his presence there would not ordinarily be expected, nor would a special lookout

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be required with reference to him. As we view the conceded facts in the case, we are of opinion that the instruction should have been given in substance, and that it was prejudicial error to refuse it.

The judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED.

FRANK ERDMAN V. STATE OF NEBRASKA.

FILED JANUARY 24, 1912. No. 17,291.

1. **Criminal Law: ATTEMPTED HOMICIDE: PRESERVATION OF EVIDENCE.**

In a criminal prosecution, based upon the explosive quality of a substance, which it was alleged was placed upon a porch of an occupied dwelling house for the purpose of committing a murder, the utmost care should be taken in preserving the substance and its identity, in order that no mistake be made, and all uncertainty removed.

2. ———: **EVIDENCE.** The paper wrapped around the substance charged to have been dynamite bore the brand of a well-known manufacturer of dynamite. It was shown that at the stone quarries, near the city of Louisville, the same brand of dynamite was used, and that the depository in which it was kept was not secured by lock and key. The accused was seen in Louisville a few days before the perpetration of the alleged crime, but it was not shown that he knew where the dynamite was deposited, nor that he was seen near there, nor that any of the dynamite there stored had been taken away. *Held* too remote and of no probative force.

3. ———: ———: **PREJUDICIAL ERROR.** A trunk dealer was called as a witness, who was permitted to testify that, prior to the day on which the alleged crime was committed, he had two suit cases in stock similar to the one offered in evidence as the one placed upon the porch of the dwelling house, and some time thereafter there was but one; the other not having been sold, so far as he knew. There was no proof that plaintiff in error had been to the store, nor that he knew of the existence of the two suit cases, nor that the supposed missing one had been sold or stolen. The objection by the defendant to this testimony should have been sustained. The evidence was immaterial and irrelevant and prejudicial to the accused.

4. ———: WITNESSES: EXAMINATION: PREJUDICIAL ERROR. The state called a witness in rebuttal. She had previously made a written statement to detectives representing the state as to the time of day when a certain picture was taken, but which she stated upon the witness-stand she had, upon reflection, concluded was erroneous. Thereupon the county attorney proceeded to read to her, in the presence of the jury, her statement taken by the detectives. *Held*, under the circumstances set out in the opinion, erroneous.
5. ———: ———: REFRESHING MEMORY. A witness who was called by the defense stated that at the time of the commission of the alleged offense he was a reporter for a local newspaper, was present when the contents of the suit case were examined by the police, and made certain notes of the condition of said contents. His testimony was asked upon a material question, when he responded that the facts had been correctly reported and the report published in the paper as furnished; that after the publication of his report he examined the article in the paper and found it correct; that the original notes were thrown aside or destroyed, but the facts as to the condition of the contents of the suit case had left his mind. He was asked to refresh his memory by a reference to the published report. Objection by the state was sustained, the court holding that he could refresh his memory only by reference to his original notes. *Held* error.

ERROR to the district court for Douglas county: LEE S. ESTELLE, JUDGE. *Reversed*.

John O. Yeiser and Charles E. Foster, for plaintiff in error.

Grant G. Martin, Attorney General, and Frank E. Edgerton, contra.

REESE, C. J.

An information consisting of three counts was filed in the district court by the county attorney of Douglas county, the first count of which charges plaintiff in error with having made an assault upon Thomas Dennison on the 22d day of May, 1910, with intent to murder the said Dennison. No further specification of the manner of the assault is contained in the count. The second count is for the same offense, but contains the averment that the as-

sault was made by placing a suit case, containing dynamite and a loaded revolver, upon the porch of Dennison's residence, the contents of the suit case being so arranged that, when lifted, the revolver would be discharged causing the dynamite to explode. The third count is similar to the second, except that the condition and contrivance of the suit case and its contents are stated with more elaboration, and which need not be here stated. A jury trial was had, which resulted in a verdict finding accused "guilty as charged in the information of the crime of assault with intent to murder." A motion for a new trial was filed, which being overruled, a motion in arrest of judgment was filed, which was also overruled, when plaintiff in error was sentenced to confinement in the penitentiary for the term of 15 years. He brings error to this court.

Testimony was introduced to the effect that on Sunday, May 22, 1910, at about 10 minutes before 3 o'clock in the afternoon, a suit case was discovered standing on the porch of Thomas Dennison; that a screw-eye had been screwed into the porch floor, and a string or cord projecting through a hole in the bottom of the suit case was tied to the screw-eye. It is shown that a few minutes before the suit case was discovered parties were on the porch and no suit case was there. During the time, up to the discovery, persons were in the house, but they knew nothing of the suit case being placed there. A dog was in the house, and the witness who was within heard the dog growl or make some alarm, and she soon afterward went to the door and the suit case was seen. The suit case was picked up by one and dropped to the floor, kicked over by another, picked up again by another and dropped down, and finally was left lying on its side on the porch floor after having been opened, when the parties all went away so leaving it. Later in the afternoon, perhaps about 6 or 7 o'clock, upon the return home of Mr. Dennison, who had been absent during the afternoon, certain policemen were called, who untied the string

from the screw-eye, and carried the suit case a short distance from the house and opened it, when certain sticks of substance, said to be dynamite, were discovered, and with them a pistol, said to have been loaded with powder and dynamite, which was so placed that by pulling the string the hammer would be raised as if to discharge the pistol, the force of the discharge reaching the dynamite, and thus producing an explosion. The sticks were removed from the suit case, placed in a bucket, and the whole, with the suit case, carried to the police station, where it was placed in a room in the upper story of the barn used in connection with the police station for the purpose of storing stolen property and such like. Later, during the succeeding week, all the sticks, about 25 in number, were removed to the foundation of a building in the city of Omaha, which was being wrecked, and were exploded in tearing down the foundation of the old building.

Assuming, as we do for the purposes of this opinion, that the contents of the said suit case was taken to the police station, it is unfortunate that some of the sticks were not at once placed in the hands of a competent chemist for analysis. It is insisted that the evidence is not sufficient to show that the sticks were so carefully kept as to render it certain that those used in wrecking the wall referred to were the identical sticks taken from the suit case. It is apparent that the strictest care should have been taken in that regard. It is also unfortunate that the police officers allowed all to be removed from their charge and care and be destroyed in blasting the wall, if they were so destroyed. Some portion at least of the "sticks" should have been carefully preserved in safe hands and presented upon the trial, in order that the fullest and most careful examination might be then made. This was not done, and an element of uncertainty, under the evidence, was presented that might have been avoided. Certain officers and others who saw the sticks testified that they were dynamite, largely basing their judgment

on the appearance of the "sticks" and their contents. Some of them testified to having used that substance, but their own testimony showed that they could easily have been mistaken, for a substance was presented to them while on the witness-stand in cross-examination which upon inspection they declared was not dynamite, but which a competent chemist analyzed and found to be that substance. Thus was the probative force of their testimony somewhat at least impaired.

As we have seen, the suit case must have been placed on Mr. Dennison's porch by some one, probably at from 2:30 to 2:45 in the afternoon, while persons were in the house and on the same level of floor. Plaintiff in error is charged with so placing it. The question of his identity becomes a most important one. He is said to have been seen in the neighborhood of Mr. Dennison's home the day and night of the day before (Saturday) and on Friday, two days before. It is shown that he was in the employ of an organization, known as the "Civic Federation," as a detective, and that his duties were to discover and unearth violations of the law in Omaha and elsewhere, and the mere fact of his presence in that part of the city, if he were present, might not raise any presumption that he was there for an unlawful purpose. It is also insisted that he was seen at and near the home of Mr. Dennison about the time the suit case was left on the porch, and one witness testified to having seen him on the porch, but saw no suit case, and did not see his face, except a side view. This witness also testified to having seen some one standing in the street in that neighborhood at about the hour of 12 o'clock, midnight, a night or two before the Sunday in question. His testimony is that he slept in an upper room, and, at the hour named, had occasion to arise to answer a call of nature, when he opened a front window of his room and from which he relieved himself. It was shown that there was a bath-room and water-closet nearly opposite his bed-room, across a hall of about three feet in width, the door of which was not more than seven or eight feet from the head of his bed.

Two witnesses, sisters, testified that on the afternoon of the Sunday in question they had been to a church building in the city, in order to have a picture of a confirmation class taken, and of which one of them was a member. One was 17 and the other 11 years of age. They stated that after leaving the church, which was some distance from their home, they walked home, and on the way they fell in behind a man on the sidewalk near the Dennison residence, who was carrying a suit case similar to the one in evidence, and, after walking near him for some distance, they turned off the walk and went to their home. They did not speak to him nor see his face, they having walked behind him, but they thought they subsequently recognized Erdman as the man. As we have seen, the suit case was discovered upon Mr. Dennison's porch ten minutes before three. No one was seen at or near the suit case, which had been left there a short time before its discovery. Some little time, at least, had been required to place it, for Mr. Dennison testified that the screw-eye was so firmly screwed into the floor that it was necessary to use a claw-hammer in unscrewing it. At least ten minutes were required for the girls to walk from the church to where they followed the man with the suit case. The picture of the class was taken on the front steps of the church. The photograph was introduced in evidence, and the elder of the two sisters was clearly identified in the picture. On the photograph is shown a shadow of the eaves of a building cast upon the side of the church. There was a difference of opinion as to just when the picture was taken, no one of the parties present being able to more than estimate or approximate the time, and, as expressed by some, "guess" at it. The professor of astronomy of the Creighton University made a careful calculation as to just what time the shadow was cast on the place shown in the photograph, and it was found to be 21 minutes and 12 seconds after 3 o'clock, which was after the discovery of the suit case on the porch. We must also add the time required to make such preparation

for departure from the church as girls of that age usually take, and the time occupied in the walk referred to. It thus appears that the person seen by the girls was not the one who placed the suit case upon the porch.

We find it impossible to review all the evidence submitted to the jury without extending this opinion to an unreasonable length, and, as the cause will probably be tried again, it would be improper for us to do so, but these suggestions are made as calling attention to what seem to us to be more or less vital questions involved. There was testimony to the effect that plaintiff in error had made threats against Mr. Dennison, claiming that Dennison had been the cause of serious losses to him. These were proper to be considered, but Mr. Dennison testified that he had never had any dealings or transactions with Erdman at any time.

The papers or wrappers around the "sticks" of the contents of the suit case were of the brand of a known manufacturer, the sticks being of a shape different from others and peculiar to the product of that factory, although not unknown to the trade. The stone quarries at Louisville, in Cass county, were visited by detectives, and it was found that the dynamite in use there was of the make or brand referred to. It was also shown that one of the depositories of dynamite was some distance from the city of Louisville, and was not protected by being locked in the place of deposit. A short time before the Sunday on which the crime is alleged to have been committed, plaintiff in error was seen in Louisville, but the state offered no evidence that he was seen near where the dynamite of the quarrying company was kept, nor that any portion of the dynamite had been missed or removed therefrom. We must confess we are at a loss to see the materiality of that evidence. There is no shadow of proof that plaintiff in error was in Louisville for any improper or unlawful purpose, nor that he even knew of the location of the unprotected dynamite. Of a similar nature was the testimony of a trunk dealer in Omaha, who testified that

prior to the 22d day of May, 1910, he had two suit cases of the same kind as the one introduced in evidence; that after that date he was visited by detectives for the state, when but one was found in stock; that he had not sold the other himself, and had no record of it having been sold; that he had clerks and employees whose business it was to sell his goods, none of whom were called to testify. There was no proof that plaintiff in error had been seen at the store, nor of any fact which could by any course of reasoning lead to the conclusion that he had in any way procured the suit case claimed to have been missing. Nothing could possibly result from this evidence, unless it might be to raise a suspicion without proof that plaintiff in error may have stolen the dynamite from the quarries at Louisville, and have purloined the missing suit case from the store. That the evidence was too remote, and, as offered, wholly immaterial, must, we think, be conceded.

Miss Alma Stuft was called by the state as a witness on rebuttal. She was a member of the class of girls whose pictures were taken on Sunday, May 22. She was not called as a witness in chief by the state. The subject presented to her was as to the time when the pictures were taken. As with others upon the same subject, she was uncertain as to the exact time, but gave her judgment, which fixed it later than what was claimed by the state. She was asked by the county attorney if she had not given a written statement to the city detective who called upon her. She answered that she had, but upon more mature reflection she was satisfied she had made a mistake in time, whereupon the county attorney proceeded to read to her, in the presence of the jury, certain extracts from the statement prepared by the detective in her presence. We copy the following: "Q. Did you make a statement and sign a statement about this? A. Yes, sir; I did. Q. I will ask you to look at this paper and state if that is the statement you made." After some discussion, followed by a ruling in favor of the state, but without an

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answer, she was asked: "You identify this as the statement? A. Yes, sir. Q. And it is correct, is it? A. Yes, sir. Q. You read that, and signed it? A. Yes, sir." After further objections by the defense, and the rulings of the court thereon, the county attorney proceeded: "But in this statement was this (reading from statement): 'We had four pictures taken altogether of the confirmation class, and the preacher was in the first picture which was taken by Otto Timme.' What do you say about that? A. I don't remember just exactly if he was in the first picture, or not; I think he was in the second picture. Q. This is the statement you made at that time, is it not?" (Not answered.) "Q. Then do you say the preacher left after the first picture was taken; that was shortly after 2 o'clock?" (Not answered.) "Q. What do you say about that? A. I think the preacher left after the second picture was taken. Q. And you say (reading), 'The Hageleit girls left after the second picture was taken, which was not later than 2:30 P. M.' What do you say to that? A. Yes; I know the Hageleit girls left after the second picture was taken. Q. Then you say (reading), 'We had two other pictures taken after 2:30 P. M.' What do you say about that? A. Well, I do not know just exactly what time it was, but I know they left after the second picture was taken—the Hageleit girls. Q. (reading) 'I know they were all completed before 3 o'clock.' A. Well, I don't know. Q. Didn't you say this a month ago? A. Yes, sir. Q. Well, is that true?" (No answer.)

There is no suggestion that this witness is unfriendly. She simply stated that upon more "serious" reflection, after making the statement, she had been mistaken. She was not called by the defense, but was the state's witness. Objections were made and overruled at every point in this examination. By this action on the part of the county attorney he succeeded in getting before the jury the *ex parte* statement made by the witness to the detective in contradiction of her testimony while being examined by him. We know of no rule of evidence which will permit

this. It is the same in principle as the course pursued in *Masourides v. State*, 86 Neb. 105, and which was condemned in that case, and in which we said: "A moment's reflection must show the fallacy of the contention of the state and ruling of the court upon this question. The necessary effect of the course pursued must have been either to discredit and, to that extent, destroy the credibility of the state's own witness, or to substitute for her evidence the former statements alleged to have been made by her." While the whole of the paper was not read to the jury, as in the *Masourides* case, yet, to the extent pursued, the vice was the same.

A reporter for the Omaha Bee was called as a witness on the part of the defense. After testifying that he was present at the time of the examination of the contents of the suit case, he was asked as to how many cartridges were in the pistol found in the suit case. His answer was, in substance, that it was impossible for him to remember the details of what he saw in making that examination; that he wrote out what he had seen and furnished it to the paper for publication; that his writing was accurately published, but the original manuscript was not kept; that he could refresh his memory from the published article and testify to what he saw in the examination made, but that he could not otherwise do so, having no present recollection of the matter suggested by the inquiry. The court, upon objection, refused to allow the evidence, holding that the witness could refresh his memory only from the original memorandum. In *Topham v. M'Gregor*, 1 Car. & Kir. (Eng.) 320, the writer of articles in a newspaper testified that all the articles written by him were true, and it was held that the newspaper containing the article under consideration might be placed in his hands for the purpose of refreshing his memory, and that he might be asked whether, looking at the articles, he had any doubt that the fact was as therein stated. See, also, *Hawes v. State*, 88 Ala. 37; *Clifford v. Drake*, 110 Ill. 135; *Commonwealth v. Ford*, 130 Mass. 64; *Jackson v. State*, 66

Miss. 89; 1 Wigmore, Evidence, sec. 760; Jones, Evidence (2d ed.) p. 1122 *et seq.*; 3 Russell, Law of Crimes (7th Eng. ed.) p. 2303.

A number of questions, arising upon the impaneling of the jury, as well as those upon and during the trial, are presented, but as the law of this state is well settled upon most, if not all, of them, and they may not occur in the further proceedings of this case, they will not be noticed. It is insisted that, under the statutes of this state, the facts stated in the information do not constitute a crime, but counsel have not seen proper to brief the law on that subject, and we need not discuss it.

The judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED.

BARNES, J., dissenting.

I am unable to concur in the conclusion of my associates. By the majority opinion it is held, as one of the grounds for reversing the judgment of the district court, that it was reversible error to submit to the jury the testimony by which it was sought to connect the defendant with the dynamite contained in the suit case which was placed on the porch of the Dennison home. It was shown by the testimony that the dynamite in question was contained in a particular kind of wrapping which was used only by the firm that manufactured that kind of explosive; that the only place in the vicinity of Omaha where that kind of dynamite was being used was in a certain quarry at the near-by town of Louisville; that a quantity of that brand of dynamite was stored there in a place accessible to any one who might for any reason desire to obtain it. It was also shown that, a day or two before the suit case was placed on the Dennison porch, the defendant was seen at Louisville, near the place where the dynamite was stored, and his presence there was wholly unexplained. Now the state had introduced testimony tending to show that the defendant was seen with a suit case like the one in ques-

tion at or near the Dennison home, at or about the time the suit case which contained this same brand of dynamite was discovered upon the Dennison porch. It was therefore proper for the jury to consider the circumstances above described, with all of the other evidence, as tending to establish the defendant's guilt. In this case, as in all other crimes of this nature, the prosecution is compelled to rely upon circumstantial evidence, and it should be remembered that a dynamiter does not go into the open market to procure his explosives, but, in order to avoid detection, is compelled to procure them in the most secret and surreptitious manner. Therefore, the state was entitled to the benefit of every circumstance which tended in any way, however remote, to aid the jury in determining the guilt or innocence of the defendant. The probative force of this evidence was a question for the jury alone, and not one to be determined, declared or commented on by a court of review.

The majority, as another reason for reversing the judgment of the district court, hold that it was error to receive the evidence of the trunk dealer of the city of Omaha that just previous to the time the suit case in question was placed on the Dennison porch he had two suit cases in stock similar to the one found at the Dennison home, that he missed one of them, and that neither he nor his clerks had sold it, so far as he knew. It is said that this evidence was immaterial and irrelevant, and was prejudicial to the accused.

It should be remembered that one contemplating the commission of the crime of dynamiting the home of another would necessarily observe the same secrecy in obtaining a suit case, or other receptacle in which to inclose his infernal machine, as he would in obtaining the explosive with which to charge it, and when it was shown that defendant was seen at or near the Dennison home with a suit case like the one in question, and which may have been the one which the dealer missed from his stock, it would seem that this circumstance was properly given

to the jury to aid them in correctly solving the main question under consideration.

The third ground on which the reversal is predicated is that the court erred in allowing the county attorney in the examination of a witness to read to her excerpts from her former written statement, in order to refresh her recollection. The contents of the written statement was neither read to her in the presence of the jury, nor was the jury permitted to examine it. In other words, it was not offered or received in evidence. I am of opinion that this was not reversible error, but was in all respects in accordance with the correct practice and the well-established rule that a memorandum or written statement made by a witness may be used to refresh his recollection. I am unable to see how this was in any way prejudicial to the rights of the defendant.

The fourth reason for the reversal is that the court erred in not permitting the Omaha Bee reporter to use or read an article published in that newspaper to refresh his recollection of what he saw at the time the suit case in question was examined. As I read the record, this witness testified that he could not recollect what he saw or just what transpired at the time the suit case was opened; that he wrote an account of the matter at the time, which was published in his newspaper; that what he wrote was correctly published; that he had lost his original notes taken at the time, but he failed to state that what he wrote was the truth of the matter, and therefore it would seem that the court properly refused to allow him to testify from the published article, because this was secondary evidence which was not clearly shown to reflect the truth of the transaction in question. Again, this ruling could not have resulted in any prejudice to the accused, for the transaction was treated by the witness as so wholly inconsequential that the facts there disclosed made no lasting impression on his mind.

Finally, and in concluding this dissent, I feel constrained to protest against so much of the majority

opinion as discredits the probative force of the evidence produced by the state, and which seems to indicate that it was insufficient to sustain the verdict of the jury. I do this because the case is remanded for further proceedings, and the opinion will make another conviction impossible. We should not thus destroy the power of those charged with the duty of enforcing our criminal laws to properly perform that duty. It would seem that the main question for this court to determine in cases like the one at bar is, has the defendant been accorded a fair trial? Upon that question, an examination of the record satisfies me that the defendant was not only accorded that right, but was given an unusual latitude in presenting his defense. The jury found him guilty, and I am persuaded that the evidence sustains the verdict. In such cases a reviewing court should not reverse the judgment for trivial causes, or technical errors.

For the foregoing reasons, I am of opinion that the judgment of the district court should be affirmed.

FAWCETT, J., concurs in this dissent.

WILLIAM W. KEMPLIN V. STATE OF NEBRASKA.

FILED JANUARY 24, 1912. No. 17,352.

1. **Criminal Law: INDORSEMENT OF WITNESSES ON INFORMATION.** Where in a criminal prosecution the case was called for trial in the district court, the names of three jurors were called and the jurors took their places in the jury box, but, before they were sworn or interrogated as to their qualifications to serve as jurors, the court, over the objections of the accused, permitted the name of an additional witness to be indorsed upon the information, but no application was made for the postponement of the trial, and no prejudice was shown, *held* prejudice will not be presumed.
2. **Burglary: EVIDENCE: MALICE.** In a prosecution for burglary by breaking and entering a dwelling house, it was shown that the doors of the house were closed in the morning when the family

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residing there left for the day; that upon their return in the evening the house had been entered and certain articles stolen therefrom. *Held*, There was sufficient proof of malice and of the breaking and entering.

3. ———: ———. The evidence is examined, and *held* sufficient to sustain the verdict of guilty.

ERROR to the district court for Garden county: RALPH W. HOBART, JUDGE. *Affirmed*.

Sullivan & Squires and T. M. Wimberley, for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton*, *contra*.

REESE, C. J.

Plaintiff in error was prosecuted in the district court for Garden county for the crime of burglary, committed on the 23d day of December, 1910, by breaking and entering the dwelling house of D. A. Kingery, with intent to steal certain personal property therein. A trial was had, which resulted in a verdict of guilty, and on the 13th day of May, 1911, he was sentenced to imprisonment in the penitentiary for the term of four years. He brings the cause to this court for review by proceedings in error.

After the case was called for trial in the district court, and after three jurors had been called into the jury box, before they were sworn on their *voir dire* as to their qualification to sit as jurors, the county attorney asked permission to indorse the name of the sheriff upon the information as a witness on behalf of the state. Permission was given, and exception was taken to the order of the court. Said order is now assigned for error.

It is contended that, as the statute requires the names of witnesses to be indorsed "before the trial," the indorsement made at the time stated was after the trial had commenced, and the order was therefore erroneous. There was no showing of prejudice, nor was any postpone-

ment of the trial asked. This was necessary if the accused were prejudiced or surprised by the action of the court in permitting the indorsement to be made. *Barney v. State*, 49 Neb. 515; *Rauschkolb v. State*, 46 Neb. 658; *Trimble v. State*, 61 Neb. 604. The present case is to be distinguished from *Wilson v. State*, 87 Neb. 638. In that case the county attorney was permitted to indorse ten names of witnesses upon the information after the case was called for trial. It was a capital case. The fact of that number of witnesses being indorsed at the moment of calling a case for trial would of itself raise a presumption of prejudice and a possible lack of fair dealing, and the granting of 24 hours of time in which to investigate as to the facts to be proved would be little less than mockery.

It is next insisted that the evidence does not sustain the verdict of the jury. Little light is thrown upon the subject, as the brief is apparently limited to the contention that malice and forcibly breaking and entering are not shown. The evidence discloses that when the family residing in the dwelling house left it in the morning they carefully closed the doors; that upon their return in the evening they found that the house had been entered and articles of value stolen therefrom. If plaintiff in error is guilty of the theft of the articles said to have been stolen, there can be no reasonable doubt as to legal malice, or the breaking and entering. Owing to the importance of the case, we have carefully read all the bill of exceptions, as well as the abstract. The weight of the testimony was for the consideration of the jury. While there are some features of the case which, to the mind of the writer, are unsatisfactory, yet there was sufficient, if believed by the jury, to sustain the verdict. That the dwelling house was broken into and certain trunks broken open and articles of small value taken, there seems to be no doubt. One of the principal contests upon which there is a conflict in the evidence is as to the identification of certain coins found on the person of plaintiff in error at the time of his arrest. They were positively identified as

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the stolen coins by witnesses for the state, while plaintiff in error and his witnesses identified them as having been in his possession before the burglary. This question was for the determination of the jury, and they resolved it against plaintiff in error.

We find no prejudicial error in the proceedings. The judgment of the district court is therefore

AFFIRMED.

CHARLES GRAHAM V. STATE OF NEBRASKA.

FILED JANUARY 24, 1912. No. 17,264.

1. **Criminal Law: INSTRUCTIONS.** Where the district court has by his instructions fully and correctly stated the law as it should be applied to the facts disclosed by the evidence in a criminal prosecution, he is not required to give further or additional instructions requested by the defendant.
2. ———: **EVIDENCE: REVIEW.** If the record contains competent evidence from which the jury could reasonably find the defendant guilty of the crime charged in the information, a reviewing court will not be justified in setting aside such a verdict.
3. ———: **TRIAL: LIMITATION OF ARGUMENT.** It is within the discretion of the district court to reasonably limit the time allowed counsel in which to argue his cause to the jury, and, unless it appears that there has been an abuse of such discretion, such a limitation does not afford sufficient reason for reversing the judgment of that court.

ERROR to the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Affirmed.*

T. J. Doyle and G. L. De Lacy, for plaintiff in error.

Grant G. Martin, Attorney General, and *Frank E. Edgerton*, contra.

BARNES, J.

The state prosecuted Charles Graham, hereinafter

called the defendant, on an information charging him with having abandoned his wife, without good cause, and with wilfully, feloniously and unlawfully neglecting and refusing to maintain and provide for her support. A trial in the district court for Lancaster county resulted in his conviction. On the 6th day of May, 1911, defendant's motion for a new trial was overruled. At his request, sentence was suspended and he was released on a bond conditioned that he would properly support and provide for his wife. On the 8th day of July, 1911, it having been made to appear to the district court that the defendant had failed to abide by the conditions of his bond, and had at all times failed, neglected and refused to furnish his wife with any means of support, he was brought into court, and, having failed to show any cause why the judgment of the court should not be passed upon him, he was sentenced to serve a term of one year in the state penitentiary. From that judgment he has appealed to this court.

Defendant contends that the district court erred in refusing to give the jury instructions numbered 4, 5, and 6, requested by his counsel. The substance of instruction 5 was that there could be no conviction under the statute upon which the prosecution was based if it should appear that the husband, by reason of lack of property, money or estate, was unable to support his wife; that such a condition amounts to good cause and constitutes a complete defense to the prosecution of such a charge. By instruction numbered 6 it was stated, in substance, that if the jury believed from the evidence the husband had reason to believe that the wife was unfaithful to him, or that the wife neglected to prepare his meals and attend to the household duties when she was in good health and able to do so, and caused the husband to go to his work each day without having any breakfast, or spoke disrespectfully and in profane language of the mother of the husband without just cause or provocation for so doing, each of said acts, if found to exist by the jury and taken seriously

by the husband, would be a good cause for his conduct, and the jury should return a verdict of not guilty.

It appears, however, that the district court, upon his own motion, instructed the jury as follows: Instruction No. 6. "Abandonment under the statutes upon which this prosecution is based is an actual, wilful desertion, followed by a wilful neglect or refusal to contribute to the support of the wife, and there can be no conviction, even if there is an abandonment as above defined without good cause, unless such actual, wilful desertion, followed by a wilful neglect and refusal to contribute to such wife's support, is without good cause. The state must prove these several facts beyond a reasonable doubt, and, in addition to this proof, must prove, beyond a reasonable doubt, that at or about the time alleged the defendant was possessed of money, property or other means available for the maintenance and support of such wife, or had at least the earning capacity and the opportunity to work at the times alleged, and at the times alleged refused, without good cause, to maintain and support such wife."

We think this instruction covered all of the points contained in defendant's request numbered 5, that it conformed to the evidence in the case, and is a correct statement of the law. Therefore the court did not err in refusing to give that request.

It appears that the court, upon his own motion, also gave instruction numbered 7, which reads as follows: "You are instructed that primarily it is the duty of the husband to provide reasonable support for his wife, and that any wilful failure and refusal, without good cause, so to do constitutes a breach of his duty in that regard, and if he also has abandoned his wife, without good cause, then he has committed a desertion as that term is used in the statutes and as set out in the first paragraph of these instructions. The expression, 'without good cause,' does not mean that the husband can abandon his wife or neglect or refuse to provide for her for some trivial reason; before the law justifies him in so doing,

he must have some substantial reason or cause which would cause or justify the ordinary person to neglect one of his most important duties."

It is contended that this instruction was too general, and did not explain or define the meaning of "without good cause," and it is insisted for that reason that the court erred in refusing to give paragraph 6 of the instructions requested by the defendant, the substance of which has been heretofore stated. To our minds the instruction given by the trial court was sufficient, and the request presented by the defendant was open to the objection that it directed attention to a portion of the evidence only, and gave too much importance to the defendant's own testimony. It appears that the defendant, by his own statements, attempted to create the impression that his wife had been unfaithful to her marriage vows, and that she had been somewhat neglectful in performing her household duties. A careful reading of the record satisfies us that the defendant made no serious complaint of any of those matters until after he had determined to abandon his wife, and, but for this prosecution, he would not have seriously considered those matters. His insinuations of infidelity on her part seem to be wholly unsupported by the testimony and without merit, while the other matters cannot be said to constitute a good ground for his failure and refusal to support his wife, although they might be considered a reason for his refusal to live with her. As we view the record, the instruction above quoted was a proper one, and the refusal to instruct the jury, as requested by the defendant, was without error.

It is further contended that the evidence was insufficient to sustain the verdict. There is sufficient evidence in the record tending to show desertion and neglect on the part of the defendant towards his wife. It appears that she was frequently left alone at night at her home, while defendant stayed out on the street or at his mother's house; that on December 21, 1910, he left home, leaving his wife a written note, stating, "I won't be home

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for supper. See?" that he remained that night at his mother's house; that his wife called him up the following morning and wanted to talk with him, but he refused to go home or have anything to say to her; that thereafter she repeatedly sought interviews with him and requested him to come home; that she asked him for \$5 with which to aid in her support, and he answered, "I haven't seen \$5;" that thereafter, at all times, he has refused to contribute anything towards her support or towards the support of her child, which was born at a later period. The testimony clearly shows that he was an able-bodied man; that he had been earning money at the rate of \$48 a month. It is true that he had, before leaving his wife, contributed to her support, and that she had no complaint to make in that respect until after the desertion took place; that at the time he deserted his wife he had \$43 in the bank, and that within a few days thereafter he secured a job with the traction company; that he was still working for the company at the time his trial took place; that he was then earning and has continued to earn from 18 cents to 20 cents an hour; that he spent the money which he had in the bank at the time he deserted his wife for a uniform and other things, and refused to contribute anything to her support, declaring, as his excuse, that he had no money.

Finally, it is contended that the court erred in limiting his counsel to 40 minutes' time in his address to the jury. We think this contention is without merit. That matter was clearly within the discretion of the trial court, and we are unable to say that the limitation was an abuse of such discretion.

A careful examination of the record satisfies us that it contains sufficient evidence to support the verdict, and the jury were justified in finding defendant guilty, as charged in the information. So far as we are able to discover, the record contains no reversible error, and the judgment of the district court is

AFFIRMED.

MABEL MCGEE, APPELLEE, v. ARAH L. HUNGERFORD,
APPELLANT.

FILED JANUARY 24, 1912. No. 16,997.

Quantum Meruit: SUFFICIENCY OF EVIDENCE: REVIEW. In this an action to recover the reasonable value of personal services as a stenographer, the fact that the jury awarded a less sum than claimed by the plaintiff to be due her does not establish that her testimony was disbelieved, and that therefore the verdict is not supported by the evidence.

APPEAL from the district court for Dawes county:
WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

J. E. Porter, for appellant.

A. W. Crites, contra.

LEITON, J.

Action to recover for services rendered by the plaintiff as stenographer, typewriter operator and clerk for the defendant. It is alleged that these services were of the reasonable value of \$8 a week, were rendered for 18 weeks, and that there is due and unpaid a balance of \$114. The defense is that services were not rendered to the extent alleged, and that full payment had been made of the wages which had been agreed upon between the parties.

The argument of appellant is mainly devoted to showing the indefiniteness and unreliability of plaintiff's testimony and the emphatic and positive nature of that of defendant. According to defendant's testimony, the plaintiff worked for him 25 days under a contract under which he was to pay her \$8 a week, amounting in all to \$28.30, and this amount has been paid; while, according to plaintiff's testimony, she worked 120 days at \$8 a week, on which she has credited \$33, leaving a balance due of \$114. Appellant argues that since the jury only allowed

plaintiff \$75, and not \$114 as she claimed, that the evidence does not sustain the verdict.

It appears, however, that plaintiff, while in the defendant's service, wrote letters and did other stenographic and clerical work for other persons, for which she was paid by them, and it seems clear that the jury believed that the reasonable value of her services should be reduced on that account. The action was on a *quantum meruit*, and the fact that plaintiff was not allowed all she demanded does not leave the verdict without support. It would serve no good purpose to set forth the evidence in detail. The question is one of fact which was submitted to the jury upon conflicting evidence, and their verdict must be upheld. Appellant argues that the verdict "may probably have been the result of the misguided chivalry of the average western ranchman toward the fair sex, especially this rather handsome and petite young litigant." We cannot take judicial notice of personal pulchritude or of western chivalry, and hence this plaintive plea cannot avail.

We find no error in the record, and the judgment of the district court is

AFFIRMED.

STATE, EX REL. SILAS R. BARTON, RELATOR, APPELLEE, v.
FARMERS & MERCHANTS INSURANCE COMPANY, RE-
SPONDENT, APPELLANT.

FILED JANUARY 24, 1912. No. 17,183.

1. **Receivers: APPOINTMENT: EQUITY JURISDICTION.** The power to appoint a receiver by a court of equity in a proper case is one which exists in such courts independent of any statute.
2. **Insurance: INSOLVENT COMPANY: DISSOLUTION: APPOINTMENT OF RECEIVER.** In an action brought by the attorney general on the information of the auditor of public accounts, under the provisions of section 28, ch. 43, Comp. St. 1911, the court may, after a decree for the dissolution of an insolvent insurance corporation

and the winding up of its affairs, under the provisions of section 266 of the code, appoint a receiver to close up its business.

3. ———: ———: ———: ———. The power to bring such an action by the attorney general and the power of the court to decree a dissolution and distribution of its effects in an action so brought must be conferred by statute, and, in the absence thereof, such a proceeding is not within the jurisdiction of the court. But, after such decree has been rendered, if under the circumstances of the case the court in the exercise of its discretion believes that the object and purpose of the action would be better subserved by the appointment of a receiver to wind up the affairs than by permitting the business to be closed by the managers or directors of the insolvent corporation as trustees, under sections 62-66, ch. 16, Comp. St. 1911, it is within its power to appoint a receiver.

APPEAL from the district court for Lancaster county:
WILLARD E. STEWART, JUDGE. *Affirmed.*

A. L. Chase, for appellant.

Grant G. Martin, Attorney General, and *Field, Ricketts & Ricketts*, contra.

LETTON, J.

The attorney general for the auditor of public accounts filed a petition in the district court under the provisions of section 28, ch. 43, Comp. St. 1911, setting forth facts tending to show that the defendant, which is a fire insurance company, is insolvent, and unable to meet its obligations or to continue in a solvent manner to transact the business for which it was organized. The prayer was that "upon a hearing of this petition said company be dissolved and a receiver appointed to wind up its affairs and to make distribution of its assets as provided by law, under the direction of this court; and for such other and further relief as the court may deem just and equitable." A rule to show cause on the 23d day of January was duly served upon the defendant, and on that day the parties appeared and stipulated that all informalities and irregularities in the service and notice were waived, a general

appearance was entered by the defendant, and it was agreed that the case might be continued, and that the day to which it was continued "would be the day upon which the order dissolving said company might be made and a receiver appointed." The case was continued from time to time by consent until the 30th day of January, when, as the record recites, "the parties aforesaid were in court, and the defendant represented by its attorney and its vice-president suggested the appointment of a particular person for receiver; that the defendant has been unable and has refused to show any cause why said defendant company should not be dissolved and a receiver appointed; the court finds upon the evidence that the facts stated in plaintiff's petition, as alleged are all true, that the defendant is insolvent," and further found that the assets are insufficient to justify continuance of the company in business, that the company was unable to meet its obligations, and adjudged that the corporation "is insolvent and that a receiver should be appointed." Charles T. Knapp was thereupon appointed receiver, and directed to take possession of all the property of the company, to proceed to wind up its affairs, and to make distribution of its effects.

On February 2 a motion for a new trial was filed by respondent, and also a motion by the relator for a *nunc pro tunc* judgment ordering the dissolution of the corporation. The motion for a new trial was overruled, the motion for a decree *nunc pro tunc* sustained, and a decree entered, as of date January 30, dissolving the corporation.

A number of errors were assigned in the motion for a new trial and are presented on appeal, but the argument is practically confined to the question whether the district court had power to appoint a receiver in a case where the action is brought by the attorney general, under section 28, ch. 43, Comp. St. 1911, acting for the auditor of public accounts, for the purpose of dissolving the corporation and distributing its effects. The respond-

ent's position is that the district court has no jurisdiction to appoint a receiver in such a case because there is no statute authorizing the appointment of a receiver of an insolvent insurance corporation in such a proceeding. Under the provisions of section 28, ch. 43, Comp. St. 1911, the auditor of public accounts, if it shall appear to him from an examination that the assets of an insurance corporation are reduced or impaired more than 20 per cent. below the paid-up capital stock, "may direct the officers thereof to require the stockholders to pay in the amount of such deficiency within such a period as he may designate in such requisition; or he shall communicate the fact to the attorney of state, whose duty it shall then become to apply to the district court, or, if in vacation, to one of the judges thereof, for an order requiring said company to show cause why their business should not be closed," and, after a hearing, if it appear that the assets are insufficient or that the interest of the public require it, the court "shall decree a dissolution of the company and a distribution of its effects." Respondent argues that, no express authority having been granted by the statute under which the right to bring the action is conferred, no power exists in the court to do more than the statute allows, viz., to decree that the corporation shall be dissolved and its effects distributed; and that other provisions of the statute govern the distribution by its former officers; that under such provisions the control of the property is not arbitrarily taken away from its directors, who are presumably best fitted to administer the affairs of the corporation, and that it is in the interest of stockholders and creditors that its affairs be wound up in as economical a manner as possible and without the necessary expenses and sacrifices incident to a forced disposition by the hands of an officer of the court.

On the other hand, it is contended by the attorney general that the district court of this state, being a court of chancery as well as of common law jurisdiction, has inherent power to appoint a receiver. It is also argued

that, while the special proceeding provided for by the statute has some of the characteristics of an action in *quo warranto*, it is not really such an action; that the attorney general by virtue of the statute represents not only the public at large, but the creditors and stockholders of the corporation which he seeks to dissolve; that by the provisions of section 266 of the code a receiver may be appointed in the following cases: "(3) After judgment or decree to carry the same into execution, or to dispose of the property according to the decree or judgment, or to preserve it during the pendency of an appeal. (4) In all cases provided for by special statutes. (5) In all other cases where receivers have heretofore been appointed by the usages of courts of equity"—that under the third and fifth subdivisions of this section there is ample statutory authority for the appointment of a receiver.

There is much force in the respondent's contention that unless there is a statute permitting the law officer of the state to apply for the dissolution of a corporation on the ground of its insolvency, and for the distribution of its effects and the appointment of a receiver, a court of equity has no such powers.

An examination of the reports of other states shows that, in nearly every instance where the statute provides that an officer of the state may apply to the courts to dissolve a corporation, the right to appoint a receiver is directly conferred in the same statute. Basing in large part their decisions upon this fact, some courts have held that, unless the statute conferring the power upon the court to entertain such an action expressly provides that a receiver may be appointed to distribute the assets of the dissolved corporation, the power to appoint does not exist. Perhaps the most exhaustive discussion of this question is to be found in the cases of *Havemeyer v. Superior Court*, 84 Cal. 327; *Harrison v. Hebbard*, 101 Cal. 152; *State Investment & Ins. Co. v. Superior Court*, 101 Cal. 135. Other cases are collected in notes to sections 288, 289, High, *Receivers* (4th ed).

To determine this question, we think it wise to examine the course of legislation in this state in relation to insolvent corporations of this nature, and, also, the proceedings in our courts in connection with the provisions of the civil code, in order to ascertain what seems to be its declared policy in this regard.

The laws of this state governing the various classes of insurance companies have been passed at different times, and to some extent consist of amendments to former statutes. Some of them appear to be very loosely drawn, but all of them recognize the necessity of supervision by an officer of the state, and authorize the closing of the business and winding up of their affairs when it is against the public interest that the corporation should be allowed to continue. The statute under which this proceeding was brought has been in force since 1873. Following the enactment of this statute, which is general in its terms, a number of acts of the legislature providing for the incorporation and management of insurance corporations devoted to certain special lines of that business have been passed. Some of these laws are exceedingly minute and specific in their provisions with reference to the powers of the court upon an application by the attorney general at the request of the auditor of this nature, while others are general in their terms, apparently implying that, the power to close up the affairs being given to the court, the necessary powers to appoint instruments to do so were already possessed. Section 6562, Ann. St. 1911, relating to City Mutual Insurance Companies, provides: "If upon such examination it shall appear to the auditor that the condition of such company does not justify its continuance in business he may apply to the district court * * * for an order requiring the company to show cause why it should not be closed." Section 6586, relating to Mutual Hog Insurance, uses identically the same language as in the last section quoted. Section 6634, relating to Mutual Plate Glass Insurance Companies, uses the same language. Section 6691, relating to

Accident Insurance Companies, provides that after an examination if it be found by the auditor that the assets are insufficient he shall require the stockholders to make good the deficiency, and in default thereof "may proceed to wind up the affairs of said company in the manner provided by law." Section 6674, relating to Accident, Sickness and Funeral Insurance Companies, provides that upon a like application, "if it is found to be for the best interests of said certificate or policy holder that the affairs of said corporation, society or association be wound up, said court or judge shall so direct, and for that purpose may appoint a receiver." This section also provides: "No action or proceeding shall be instituted with a view to the appointment of a receiver or closing up the business of any such corporation, association or society by any other person, or in any other manner except as herein provided." Section 6480, relating to Mutual Benefit Associations and Life Insurance Companies, after like provisions as to examination, provides: "If it is found to the best interest of said holders of certificates that the affairs of said corporation be wound up, said court or judge shall so direct and for that purpose may appoint a receiver." In some of these statutes the appointment of a receiver is expressly mentioned, in others the right to appoint can only be implied, but the nature and purpose of the relief afforded in each is that the corporation be dissolved and its affairs wound up by the court.

The precise language of the section in question in this case is that the "court or judge shall decree a dissolution of said company, and a distribution of its effects." Comp. St. 1911, ch. 43, sec. 28. It is our opinion that, until the judgment of dissolution and the decree of distribution is entered, the court acts under the special powers conferred upon it by the statute, and, unless it had been so enacted, jurisdiction to act on the application of the attorney general would not exist; but we are also of the opinion that, having dissolved the corporation and being charged with the winding up of its affairs, the court may properly,

under the usages of courts of equity, call to its aid a receiver as an officer of the court for the purpose of carrying out the provisions of its decree. This is a power which exists in courts of equity independently of any statute (Alderson, Receivers, sec. 12; 5 Thompson, Corporations (2d ed.) sec. 6330), and is one which is often exercised in actions brought under the general equity powers of the court by a stockholder or creditor to dissolve the corporation. This is the view of the supreme court of the United States. The Sherman Anti-Trust Act (26 U. S. St. at Large, ch. 647, p. 209) does not by its terms provide for the appointment of a receiver in cases brought to dissolve unlawful combinations, or corporations formed for unlawful purposes, but in *United States v. American Tobacco Co.*, 221 U. S. 106, 186, the court say: "We might at once resort to one or the other of two general remedies—(a) the allowance of an injunction * * * or, (b) to direct the appointment of a receiver to take charge of the assets and property in this country of the combination," etc. A receiver was not appointed in the case because the court thought the desired result might better be accomplished by further decree, but the excerpt from the opinion indicates the mind of the court as to the power.

The supreme court of California has taken a different view, saying: "The jurisdiction of the superior court to decree a dissolution of any corporation exists only by virtue of statutory authority. It does not possess this authority by virtue of its inherent general jurisdiction in equity * * * And, as its jurisdiction is derived from the statute, it is limited by the provisions of the statute, both as to the conditions under which it may be invoked and the extent of the judgment which it may make in the exercise of this jurisdiction." *State Investment & Ins. Co. v. Superior Court*, 101 Cal. 135, 146. So far we agree, but we cannot agree that, after a decree of dissolution has been made and the court is winding up the affairs of the corporation, it may not, if in its discretion it appears necessary, call a receiver to its assistance, not as a part

of the judgment, but as ancillary thereto and in aid thereof. *Supreme Sitting of Order of Iron Hall v. Baker*, 134 Ind. 293, 20 L. R. A. 210. A number of the cases cited by the California court merely decide that a temporary receiver cannot be appointed in such cases *pendente lite*, and are not authority on the real question before it. We think this is the view upon which our district courts have acted for years. *Wyman v. Williams*, 52 Neb. 833. The point was not involved, but the report shows what the practice has been in this state. Under sections 62-66, ch. 16, Comp. St. 1911, upon dissolution the property may be left in the hands of the officers as trustees subject to the control of the court, unless, as therein provided, "other persons be appointed * * * by some court of competent authority."

In construing a similar provision as to appointment of a receiver by competent authority, the supreme court of Alabama said: "The manifest general purpose of the legislature was to commit the affairs and properties of a corporation so dissolved to the persons who were its managers at the time of the dissolution; but the lawmakers recognized that there might be special circumstances or peculiar exigencies in a given case which would breed a necessity to take the corporate affairs and property out of the hands of such managers, and, to exclude any idea that the statutory designation of trustees should have the effect of ousting the ordinary jurisdiction of courts of chancery to appoint receivers upon such circumstances or exigencies being made to appear, they expressly saved this jurisdiction, though doubtless such reservation was in fact unnecessary. But, whether necessary to that end or not, the provision in the statute having relation to the appointment of receivers by courts of competent jurisdiction was in pure conservation of an existing jurisdiction, and in no sense creative of a new power and jurisdiction. It does not undertake to confer authority upon any court which it had not before, but it refers to courts already invested with 'competent authority.' The rule declared by the statute is that the managers of the corporation at the

time of its dissolution shall administer its affairs after its death, and the exception to this rule is the intervention of a receiver appointed by a court of competent authority." *Weatherly v. Capital City Water Co.*, 115 Ala. 156, 171.

The appointment is discretionary, and, unless an abuse of discretion has been shown, a reviewing court will not interfere. We may incidentally remark that this court has uniformly discountenanced the practice of taking property from its owners by the hands of a receiver against their consent except upon the clearest grounds. *Miller v. Kitchen*, 73 Neb. 711; *Ponca Mill Co. v. Mikesell*, 55 Neb. 98; *Smiley v. Sioux Beet Syrup Co.*, 71 Neb. 586; *Vila v. Grand Island E. L., I. & C. S. Co.*, 68 Neb. 222. It would seem that the respondent was of the opinion that the district court had power to appoint a receiver, for the record recites that it suggested a person to act in that capacity, who was denied appointment. The record also recites that it was agreed that the day to which the case is continued "would be the day upon which the order dissolving said company might be made and a receiver appointed." It was not until this day to which the agreement referred that respondent asked leave to file a showing next day why a receiver should not be appointed. Obviously no reason being apparent for this delay, the court did not err in refusing further time.

Objection is made here that Mr. Knapp is a relative of the judge who made the appointment. No objection was made to his appointment at the time for that reason, and no showing has been made that he is incompetent or untrustworthy, or even to prove the allegation that he is a relative of the judge, except a mere affidavit that the affiant is informed and believes that the receiver is a relative. This is insufficient, and under these circumstances we cannot consider these objections.

For these reasons, the judgment of the district court must be

AFFIRMED.

FAWCETT, J., dissenting.

Upon the question of the power of the district court to appoint a receiver in a case like this, I think the law is correctly stated in the California cases cited in the majority opinion. The fact that the legislature, in the several instances set out in the opinion, added to the provisions cited express authorization for the appointment of a receiver strengthens, rather than weakens, the contention that it did not intend to grant such authority in the statute under consideration. The legislature said that in a case like this the "court or judge shall decree a dissolution of said company and a distribution of its effects." There the legislature saw fit to stop, and there the court should stop. Where, upon examination of an insurance company, the auditor finds that its capital is impaired more than 20 per cent., the district court, in a proceeding instituted by the attorney general, may say to the company that the state will no longer sanction its continuing business as a going concern, and that it must immediately cease doing business as an insurance company and distribute its effects among those entitled thereto. Having done that, the law department of the state has performed its full duty, and the court has gone as far as authorized to go by the statute. It then becomes the duty of the directors of the insurance company to close the doors to general business and to immediately proceed to collect and distribute the assets of the company as ordered by the court. This in my judgment is a wise provision. A receiver is the most expensive luxury known to the law. The directors of the company, if they are honest, and they must be presumed to be so until the contrary is shown, can collect and distribute the assets of the company with far less expense than can be or ever is done by a receiver. Many corporations, the affairs of which have been administered by honest officials, have proved unsuccessful as business enterprises. Even if this lack of success be attributable to a want of capacity by the officers and direc-

tors of such corporation to successfully conduct a business undertaking, it by no means follows that they are not competent, when the further prosecution of the business is stopped, to collect and distribute the assets; and the court should not deprive them of that right by the appointment of a receiver, thereby unquestionably reducing the amounts of the dividends to the distributees, unless clearly and explicitly authorized to do so by express statute. If in the collection and distribution of the assets it appears that the directors are either incompetent, negligent, or dishonest, any one interested in the assets may apply for the appointment of a receiver. In such a case the court would have jurisdiction under the general statutes cited.

Since writing the foregoing, there has been added to the majority opinion a quotation from the opinion in *Weatherly v. Capital City Water Co.*, 115 Ala. 156. An examination of that opinion shows that, if it is to be followed as an authority by us, the judgment in this case must be reversed. The two sections of the syllabus applicable to the point under consideration read:

"(2) Under the provisions of the statute (Code of 1886, sec. 1691), after the dissolution of a corporation by its charter being adjudged forfeited, a receiver is not appointed as a matter of course; but the business and properties of the corporation so dissolved are committed to the persons who were its managers at the time of its dissolution, and they become entitled to the right, and are charged with the duties, of administering and settling its affairs.

"(3) The provisions of the statute (Code of 1886, sec. 1691), committing the estate of a corporation dissolved by forfeiture of its charter to those who were its managers at the time of its dissolution as trustees for its creditors and stockholders, do not oust the ordinary jurisdiction of courts of chancery to appoint receivers under the circumstances and exigencies which demand such appointment; but, in order to justify the appoint-

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ment of a receiver of a corporation so dissolved, there must appear such facts as, under the general principles of equity jurisprudence, call the power into exercise; such as incompetency or unfaithfulness or mismanagement on the part of trustees or the absence of authority on their part to subserve some peculiar interest of the party complaining, by reason of which he is injured."

None of the reasons there assigned as being sufficient to justify the exercise by the court of its general chancery powers is alleged in the case at bar. Such being the fact, then, under the law as announced by the Alabama court, the managers of this company, at the time its dissolution was ordered by the court, became "entitled to the right" of administering and settling the affairs of the the company, and, nothing having been alleged to justify a refusal to grant them that right, the appointment of a receiver was unwarranted. The reasoning and holding of the Alabama court are in entire harmony with the views I have tried to express.

REESE, C. J., concurs in this dissent.

ROZELLA McDONALD, APPELLEE, v. FOSTER BROWN,
APPELLANT.

FILED JANUARY 24, 1912. No. 17,262.

1. **Bastardy:** NATURE OF PROCEEDING. Bastardy proceedings are civil and not criminal in their nature.
2. ———: **EVIDENCE.** The written examination of the complainant before the justice in bastardy proceedings may be given in evidence at the trial by either party.
3. ———: **INSTRUCTIONS: VARIANCE.** Where the plaintiff charged that the intercourse which resulted in her pregnancy was had upon September 28, and the evidence tended to show that if defendant was guilty at all it must have taken place on September 30, an instruction that the jury might find the defendant guilty whether the intercourse was had on either date is not erroneous.

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4. **New Trial: NEWLY DISCOVERED EVIDENCE.** To entitle a party to a new trial on the ground of newly discovered evidence, it must appear that the applicant could not in the exercise of due diligence have discovered and procured such evidence at the trial. It must further appear, where the alleged newly discovered evidence is cumulative in its nature, that it is of such a weighty character as would probably change the result of the trial. *Hoffne v. Ewings*, 60 Neb. 729.
5. **Appeal: MISCONDUCT OF COUNSEL: REVIEW.** In order to review misconduct of counsel during the trial as a ground of error, the alleged misconduct must have been called to the attention of the district court, an adverse ruling had, and an exception taken.
6. Evidence examined, and held to sustain the verdict.

APPEAL from the district court for Pawnee county:
JOHN B. RAPER, JUDGE. *Affirmed.*

Story & Story and Burkett, Wilson & Brown, for appellant.

O. F. Reavis, contra.

LETTON, J.

This is an appeal from a judgment of filiation. The first complaint is that the court erred in admitting in evidence the examination of plaintiff taken before the justice of the peace. The statute, however, provides: "At the trial of such issue the examination before the justice shall be given in evidence." Comp. St. 1893, ch. 37, sec. 5. This question was raised in *Stoppert v. Nierle*, 45 Neb. 105, and it was held that either party is entitled to offer the whole examination in evidence. In the opinion it is said that the words of the statute that the examination before the justice shall be given in evidence "are plain and direct in their import and no interpretation of them is necessary to ascertain their meaning. The statement is that 'the examination before the justice shall be given in evidence,' and to us it clearly authorizes its use by either party and its reception when offered by either." *State v. O'Rourke*, 85 Neb. 639.

We think what is said in the *Stoppert* case also disposes of the alleged error in the refusal of the court to give appellant's instruction No. 4 limiting the force and effect of this evidence. *Dodge County v. Kemnitz*, 28 Neb. 224; *Morgan v. Stone*, 4 Neb. (Unof.) 115.

As to the complaint made of the limitation of cross-examination and in striking out certain statements made by appellant to the witness Mrs. Dickenson: In the circumstances of this case neither the exclusion of this evidence nor the limitation of the cross-examination could be prejudicial, since the matters involved were otherwise proved, and taking all the evidence together were really immaterial.

It is also contended that the court erred in giving instructions Nos. 1 and 4. No. 1 told the jury that a proceeding in bastardy is a civil and not a criminal action, and that its purpose is to establish the parentage of the child and to provide that the father shall support it. This is a correct statement of the law. The gist of instruction No. 4 that, if the jury believed that all the material facts were proved against the defendant, they should find defendant guilty whether the sexual intercourse was had on either September 28, 29 or 30, 1909, is clearly correct, because proof of the exact date upon which the intercourse was had is not essential.

The principal contention is that the verdict is not supported by the evidence and is contrary thereto. The evidence is somewhat peculiar. The plaintiff and her father and mother testify that the defendant, driving a dun and a black horse hitched to a buggy, came to their home on the evening of September 28, 1909, about sundown, and invited complainant to take a ride, that she consented, and they departed, driving southward on the section-line road west of their house. Plaintiff testifies that, after proceeding about a half mile from home, he took her from the buggy, and that intercourse was there had. All three of these witnesses say that they were gone from an hour to an hour and a half, and got back between 8 and 9

o'clock, but it is not shown how the time of absence or of return was fixed in their minds. They also say that when he first came he spoke of having visited the plaintiff's sister, who was teaching in Kensington, Kansas, the previous week, and that they told him she had written he had been there. Three other witnesses, apparently disinterested, testified that one evening in the latter part of September, 1909, they saw the plaintiff and the defendant in a buggy driving southward from the McDonald home on the section-line road referred to, at about the same time in the evening as testified to by the plaintiff. Plaintiff testifies that after this occurrence she did not again see the defendant until about a month later, when she and her mother in driving past the home of his father met him and there informed him that she was pregnant as a result of the intercourse; that he then promised to come to their home that night and talk the matter over, but that he failed to do so, and afterwards left the state. The child was born June 20, 1910.

To meet this testimony the defendant proved, without dispute or contradiction, that on the 28th of September he was at Kensington, Kansas, a distance of over 150 miles from the plaintiff's home; that he returned to Pawnee county in the afternoon of September 29, and that night went with his father to his home, which is a few miles north and west from where plaintiff resided. The next day he took his father's team and left home in the morning to attend the Turkey Creek fair, which is held in Kansas, about 6 or 7 miles south of the town of DuBois, Nebraska; that he spent part of the day at the fair, and left in the afternoon. So far, his movements seem to be positively determined. What took place after this is the material inquiry. Defendant testifies that he left the fair intending to go directly to DuBois; that he reached DuBois about sundown, and afterwards registered at the hotel and took supper there. From there he drove straight home, a distance of about 6 or 7 miles westward and north, arriving home about 8 or 9 o'clock that night. The

landlord and a waitress in the hotel testified in corroboration, though both were somewhat uncertain as to the exact time they saw defendant. The landlord said it was about 6 o'clock, and afterwards that he came in a little late, a little after 8; that when he came out of the dining room the hotel was lighted, and that he stood there and talked for half an hour afterwards. The waitress testified that Brown had his supper after the others; that the lamps had been lighted when he came, and that he was the last one in for supper. Another witness testified that he was with Brown in the afternoon at the fair, and saw him about sundown drinking at the town pump in DuBois; that it was 6:30 when the witness left DuBois, and he saw Brown there 8 or 10 minutes before, which was about dark. Defendant further testified that he visited Miss McDonald's sister in Kensington, Kansas, a short time before he came home. He denies going to McDonald's home or meeting any of the witnesses who testify they saw him in company with the plaintiff. He also says that he first learned that Miss McDonald charged him with being the father of her unborn child on the Wednesday after the November election, and that he left the state the next day and remained away until the latter part of April, 1910. Defendant's home is about 6 miles west and 2 miles north of DuBois. McDonald's place is about 7 miles west of DuBois, and the Turkey Creek fair was 7 miles south of that town. On the afternoon of September 30, Fred Brackett, another witness, who had attended the Turkey Creek fair, was driving on a road $2\frac{1}{2}$ miles west of the straight road from Turkey Creek to DuBois, when he was overtaken by the defendant. After he passed this witness, the defendant drove westward in the direction of McDonald's, but the road did not run through, and he was compelled to drive back to the road running north, where he again passed this witness. Defendant also testifies to this.

The jury evidently believed that the defendant did not reach Pawnee county until September 29, and that the

plaintiff and the witnesses who testified that they saw the defendant on the evening of the 28th were mistaken as to the exact date. It also seems probable that, in weighing the testimony on behalf of the defendant, they considered the facts; that he was positively contradicted as to the color of the team he drove; that he first testified that after the fair he intended to and did drive directly to DuBois, but that, just before Mr. Brackett testified, he admitted that when he left the fair he was seen about 2½ miles west of DuBois driving west towards McDonald's till the road was blocked, and he then returned and drove north again and only determined to go to DuBois after he had passed Brackett the second time; as well as considering a number of other inconsistencies found in the defendant's testimony. Another circumstance, which no doubt had effect, is that defendant left the state immediately after he was accused. Whether the defendant went to DuBois that night or not, we think the evidence sufficiently justified the jury in believing that the defendant had sexual intercourse with the plaintiff on the evening of September 30, and that he was the father of her child.

It is next complained that the court erred in refusing a new trial on account of the misconduct of plaintiff's counsel. In this connection it is stated that the witness Davis, who testified for the defendant, was permitted to refresh his recollection from the hotel register. This was on March 15, 1911. The register was not introduced in evidence. That the next day, the witness not being present, plaintiff's counsel called for the register, and, finding it was not there, asked in a loud voice for a subpoena to be issued for Davis, which the court allowed, but no effort was made to subpoena Davis or to procure the register. It is also assigned that further misconduct of counsel took place by referring to the name upon the hotel register as evidently erased and making like statements during his address to the jury. The evidence of Davis, who was landlord of the hotel, showed that the name was blurred and bore some appearance as if an erasure had been made.

The evidence is not clear as to this, but Davis testified that the blurring or obscuring was caused by handling of the register by curious individuals after rumors of this case and of Brown's defense had become public property in the little village. The record does not indicate that the attention of the court was called to any claimed misconduct of counsel at the time, and it is not contended that anything said by the district judge prejudiced the defendant in any way. We can see no error here. The register was in the hands of defendant's witness, and might have been introduced in evidence by him if properly identified.

It is also contended that the motion for a new trial upon the ground of newly discovered evidence should have been sustained. In this motion it is alleged that since the trial defendant has discovered that one Miller, a clerk in a store at Seneca, Kansas, and one LaRue, a student at Lawrence, Kansas, were present in the hotel in DuBois at the time defendant took supper there, saw defendant there, and will testify to these facts. The affidavits of these persons are attached to the motion, and are to the effect that they attended the Turkey Creek fair, and that evening drove to DuBois to attend a dance at the DuBois opera house; that about dusk they went to the hotel for supper, and that a few moments before they left the dining room the defendant came in. The time they went into or left the dining room is not stated. The defendant must have thought that it was essential to his defense to establish his whereabouts on the evening of September 30, 1909. He produced the hotel proprietor, the waitress, and Hunsicker to show this fact, but apparently made no attempt to discover the identity of the two young men in the dining room until after the trial. He testifies he saw these men in the dining room, but did not know their names until given to him by Miss Nedela, the waitress. If it was important to him to have the evidence of the other witnesses as to his presence in the hotel at that particular time, it was equally necessary to have that of these men, unless he was prepared to take the

chance that the evidence of these witnesses would not be needed. The testimony offered is only cumulative in its nature, and not to such a degree that it is likely to change the result. We think that the district court did not abuse its discretion in refusing to grant a new trial on the ground of newly discovered evidence.

In conclusion, while the condition of the testimony is unusual, we think the well-known difficulty in fixing the exact time of an event by witnesses whose attention has not been called particularly to the time of its occurrence until months afterwards, with nothing special happening at or near the time to call their attention to the particular day or hour, explains to some extent the discrepancy in regard to dates and to the hour of the day. It is perhaps true that nothing in the realm of memory is so illusive and uncertain as the element of the lapse of time. This is pointed out in an interesting manner by Mr. Moore in his work on Facts, vol. 2, sec. 845 *et seq.* We are further of opinion that the contradictions and inconsistencies in the defendant's own testimony as to his doings on the afternoon and evening of September 30, the admitted fact that the next day after being accused he left the state and remained away for months, and the testimony as to his being seen with the girl under circumstances similar to those which she describes are sufficient to sustain the verdict. The defendant may be innocent, but the preponderance of evidence seems to justify a verdict based upon a contrary view.

The judgment of the district court is therefore

AFFIRMED.

KATE SCHRADER, APPELLEE, v. MODERN BROTHERHOOD OF AMERICA, APPELLANT.

FILED JANUARY 24, 1912. No. 16,580.

1. Insurance: ACTION ON POLICY: DEFENSE OF SUICIDE: BURDEN OF PROOF. In an action upon a policy of life insurance, the burden

of proof is upon the defendant to prove by a preponderance of the evidence a controverted defense that the assured died as the result of poison, self-administered with suicidal intent.

2. ———: ———: ———: EVIDENCE. The defense in such a case is not made out unless the evidence clearly and unmistakably points to the conclusion of suicide, and to the exclusion of all reasonable probability of death by accident or from natural causes.
3. ———: ———: SUFFICIENCY OF EVIDENCE. The evidence adduced in this case is referred to and commented upon in the opinion, and held sufficient to sustain a verdict in the plaintiff's favor.

APPEAL from the district court for Logan county:
HANSON M. GRIMES, JUDGE. *Affirmed.*

J. G. Beeler, for appellant.

Wilcox & Halligan, contra.

Root, J.

This is an action upon a certificate issued by the defendant, a fraternal life insurance company. The plaintiff prevailed, and the defendant appeals.

The sole defense is that the assured committed suicide by taking strychnine, and the sole important question here is whether the evidence sustains the verdict. The presumption is against suicide. *Hardinger v. Modern Brotherhood of America*, 72 Neb. 869; *Walden v. Bankers Life Ass'n*, 89 Neb. 546. Upon the issue of suicide, the evidence is in substance as follows: Schrader, the assured, a few days before his arrest on a charge of forgery, purchased 25 cents worth of strychnine from a local druggist, and said at that time that he intended to send it to his parents, who resided at Gandy. Schrader at the time of his death was confined in a jail. Schrader's fellow prisoners testify that a few moments before his fatal illness became evident he retired to a hydrant in close proximity to the latrine, a point which, it may be inferred from the evidence, is screened from the view of persons in the larger room used for a lounging room and

a dining room by the prisoners. These men are of opinion that Schrader, after opening the hydrant, flushed the latrine. Immediately thereafter Schrader returned to the larger room, where the noon-day meal was ready, and there swallowed coffee and ate a part of a slice of bread, but within a few moments was seized with convulsions and fell upon the floor, his muscles jerking, his limbs rigid, and bloody froth appearing upon his lips; then the man's muscles relaxed for a short time, and then subsequently the convulsions followed each other at short intervals; the stricken man called for water, cried out the name of a relative, became black in the face, his jaws became rigid, and within 15 or 20 minutes after the first attack he departed this life. A physician appeared about three minutes before mortal dissolution, and upon trial testified that in his opinion the man died from strychnine poisoning. On cross-examination this witness admitted that many of the symptoms present in Schrader's case would appear in an epileptic attack, and that he made no examination of the man's person. From the testimony of all of the witnesses present it is evident that there was no opisthotonos, but this is in a measure explained by the fact that several of the other prisoners restrained him while he was in the grasp of convulsions. None of the witnesses testify to that hideous distortion of the countenance generally observed in such cases. Dr. McLeay, a physician, in testifying on behalf of the plaintiff, said in substance that the symptoms would occur in a case of uræmia, and many of them would appear in epileptic attacks, and that, while they might indicate strychnine poisoning, they might also indicate morbid conditions produced by other and natural causes, and that an examination of the contents of Schrader's stomach would be necessary in order to make a correct diagnosis of the cause of the man's death. No remnant of any poisonous substance was found on Schrader's person or in his cell, no one saw him swallow anything more harmful than coffee and bread.

It is not shown that Schrader did not send the poison to his relatives. The deputy sheriff searched the prisoner at the time he was incarcerated in the jail, and testifies that he did not find a bottle or other container in the prisoner's clothing or on his person. The search was not so close as to preclude the possibility that the prisoner did not have crystals of the poison in his possession, but the tendency is to prove that he did not take the poison into the jail. It is also proved without dispute that Schrader's relatives had arranged to give a recognizance for his release, and that he knew this fact, and it further appears that after a conference with a Mr. Tanner, less than an hour before Schrader's death, he said to the jailer: "I have got this fixed up." "They will never take me to the penitentiary." These declarations may be ambiguous, but it was competent for the jury to deduce therefrom that Schrader was making satisfactory progress in the matter of securing his freedom, possibly for immunity from prosecution. No post mortem was held on the remains of the deceased, nor, so far as we are advised, was any request made by the defendant of Schrader's surviving relatives that such an examination should be held. Whether Schrader died as the result of poison, and, if so, whether it was self-administered with suicidal intent, must be ascertained from this record, if at all, by a process of deduction from the facts in evidence, sustained or contradicted, as the case may be, by the opinions of two physicians whose conclusions are not entirely harmonious. The jury's verdict that the evidence adduced did not overcome the presumption of accidental death, or death from natural causes, is in our opinion sustained by sufficient evidence. *Hardinger v. Modern Brotherhood of America*, *Walden v. Bankers Life Ass'n*, *supra*. The alleged erroneous admission of evidence was not argued at the bar, and should not be considered in the state of the record.

Finding no error in the record, the judgment of the district court is

AFFIRMED.

FAWCETT, J.

The foregoing opinion, prepared by ROOT, J., while a member of the court, is now adopted by and filed as the opinion of the court.

SEDGWICK, J., dissenting.

Some of the facts disclosed by the record are stated in the majority opinion. The record also discloses that when the deceased was charged with forgery he obtained some strychnine at a drug store, stating that he intended to send it to his parents, at another town, to be used by them in killing rats. Afterwards he was arrested and confined in jail. There is no evidence that he sent the strychnine to his parents or that he ever intended to. While the other prisoners were at the dinner table, the deceased passed by the latrine, stopping for an instant, and then went to the dinner table. He was immediately seized with convulsions, as described in the opinion, and in a few moments died. It is shown that a member of his family had been afflicted with epilepsy, and that some of the symptoms which he manifested were also common to epilepsy, but not all of them. He had never been afflicted with epilepsy, and had made no complaint of being ill while in the jail, and had remarked to some of the prisoners, with confidence, that he would never go to the penitentiary. The expert evidence in the record shows that epilepsy is seldom fatal, especially in the first attack. The expert witness called by the plaintiff testified that he had never known of such an instance. It is not necessary to repeat the circumstances recited in the majority opinion, and perhaps unnecessary to mention other circumstances which appear to strengthen the evidence of suicide. If the question of poisoning were involved in a criminal prosecution for felony, this evidence would be regarded as establishing the use of poison beyond a reasonable doubt. This is a civil action, and the jury were required to find their verdict from the preponderance of

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the evidence. I think it is clear that the jury has disregarded the evidence, and that the judgment ought to be reversed.

We ought not to establish precedents that lead the trial courts and juries to understand that suicide by poisoning cannot be proved in this state, and so deprive these fraternal societies of a defense to which they are justly and lawfully entitled.

ELIZABETH HARMAN ET AL., CROSS-APPELLANTS, v. BENJAMIN FISHER ET AL., APPELLEES; JOHN KOLP ET AL., APPELLANTS.

FILED JANUARY 24, 1912. No. 16,961.

1. **Trusts: DEED: VALIDITY: ADVERSE POSSESSION.** An express trust with respect to real estate may not be created or declared by parol, yet if a parent conveys a tract of land to her son for the benefit of J., the grantee, and his brother B., and for more than ten years subsequently they occupy the land as tenants in common, B. tilling the farm and making lasting and valuable improvements thereon, under a claim of ownership, and J. conceding during that period that his brother owns one-half of the land, the heirs of J. will not be permitted to disturb B. in his possession and title to an undivided one-half of the real estate, notwithstanding there is no written evidence of a trust or of B.'s title and none was ever executed.
2. **Deeds: CONSIDERATION: PAROL EVIDENCE.** In a contest between heirs of the whole blood and heirs of the half-blood of an intestate, oral evidence is admissible to prove that the sole consideration for the deed from his mother, whereby he was vested with title to the tract of land in controversy, was love and affection, notwithstanding the sole recitation in the deed of a consideration is a substantial, valuable consideration.

APPEAL from the district court for Furnas county:
ROBERT C. ORR, JUDGE. *Affirmed.*

J. J. Thomas, John F. Fults, W. B. Whitney and F. W. Byrd, for appellants.

Perry, Lambe & Butler and John Stevens, Jr., for cross-appellants.

W. S. Morlan, contra.

Root, J.

This is an action in equity to settle conflicting claims to a quarter section of land in Furnas county. The case is here on appeal and cross-appeals.

Elizabeth Fisher, a widow, one of the pioneers of Furnas county, acquired title from the United States to the land in controversy. Mrs. Fisher was the second wife of her husband, and to them were born three sons and two daughters, all of whom attained maturity. Of these children Benjamin, the oldest, for many years was the head of the family. One son, Perley J. Fisher, departed this life subsequently to his mother's demise, and his heirs are parties to this action. The daughters married, and they also are parties hereto. Benjamin, subsequently to his marriage, lived separate from his mother, but in the immediate neighborhood of her home. The other son, John Thomas Fisher, remained unmarried, and departed this life intestate May 28, 1908. Elizabeth Fisher departed this life intestate September 17, 1895. There are numerous other parties to this action, all of whom are relatives of the half-blood of John Thomas Fisher or assignees of some of those relatives. For convenience sake they will be collectively referred to as "the half-bloods." All of these relatives are descendants of John Thomas Fisher's father by the first marriage, and in the veins of none of them flows the blood of Elizabeth Fisher.

There is evidence to prove and this court may take judicial notice of the fact that droughts, insect plagues and almost universal low prices for farm products prevailed in western Nebraska during many of the years covered by this inquiry. The proof also discloses that Benjamin Fisher years ago sold his homestead, and the pro-

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ceeds were used in part at least for the benefit of his mother's family; the same sacrifice was made by one of the daughters; and John Thomas also brought to the common fund the proceeds of the sale of a tract of land formerly owned by him. The close and tender relations which the evidence discloses existed between this widow and all of her children continued to the close of her natural life.

In 1895, during a period of financial depression, the Fishers were in sore need of money, and, for the purpose of supplying her sons Benjamin and John Thomas with funds, Elizabeth Fisher, probably at the suggestion of Benjamin, determined to mortgage her farm; she also concluded that, for the purpose of keeping the title to the homestead in those sons, she would convey the farm to them. The attendance of a justice of the peace was procured, and, according to his testimony, he was directed by Mrs. Fisher to prepare a deed conveying the farm to these men. She said, "My time is short, and I want this land to remain with the Fisher boys," referring to Benjamin and John. Before the deed was drawn, it was mentioned that Benjamin's wife was not in condition to go to Beaver City, the county seat, to sign the mortgage, which it was proposed should be made, and thereupon it was suggested by the scrivener, or by Benjamin, that the deed might be made to the unmarried son, John Thomas, and this was done. Subsequently the mortgage was executed to secure the payment of \$500. The deed was executed February 28, 1895, but seven months before Mrs. Fisher died. The proof discloses that John Thomas Fisher was an easy-going, pleasure-loving man of simple tastes, working at times on the farm and on another quarter section, the title whereto he acquired under the pre-emption laws, but devoting considerable of his time to hunting, attending baseball games, and occasionally indulging in a mild drinking bout. Benjamin farmed his land, the land in controversy, and John Thomas' pre-emption, so that Benjamin received all of the income from these tracts of land; he also paid the taxes thereon, and supplied John Thomas

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with whatever money he desired. With one possible exception there seems to have been no friction between the brothers; but John Thomas, relieved of all responsibility and the necessity of earning his bread in the sweat of his face, was content that Benjamin should farm the land, pay the taxes and all expenses, receive the proceeds, and furnish his brother such sums of money as he demanded. The evidence is uncontradicted that John Thomas was well supplied with money, and that it was all furnished by his brother Benjamin. This condition existed before, as well as subsequently to, the execution of the deed by Elizabeth Fisher.

The court held that the deed executed by Mrs. Fisher was void and conveyed no title; a deed from Mrs. Bailey, one of Mrs. Fisher's daughters, to Benjamin Fisher was set aside, and the title to the land was quieted as follows: In Benjamin Fisher an undivided three-fourths, in the heirs of Perley J. Fisher, each a one-thirty-second part, collectively a one-eighth, and in Mrs. Bailey an undivided one-eighth. Benjamin's portion includes the share his sister, Mrs. Kolp, inherited, which she conveyed to him. The writer of this opinion is directed by a majority of the court to say that, while this court does not adopt all of the findings nor the reasoning of the learned district judge, we are of opinion that he attained the correct result, for the reasons following: We are inclined to the view that the heirs cannot now successfully question the validity of the deed from Mrs. Fisher to her son John Thomas. At this late date it is immaterial whether there was a consideration for the deed, or whether it was executed by reason of Benjamin's undue influence. John Thomas was in possession of this land, under a claim of right, for more than ten successive years subsequently to the execution of the deed and to Mrs. Fisher's demise, before he departed this life and before this suit was commenced. Therefore the plea of the statute of limitations is sustained. Nor do we think there is any such proof of recently acquired knowledge of the alleged duress, fraud or lack of consideration as will toll the statute.

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To the contention made by the plaintiffs and by the relatives of the half-blood that the deed conveyed no estate to Benjamin, and that, since no writing was signed by Elizabeth Fisher or by John Thomas Fisher, no trust was created or declared which Benjamin may avail himself of, and therefore he has no interest in the land other than as an heir of John Thomas, we have to say: If the evidence of the justice of the peace is competent, it discloses that Elizabeth Fisher intended that her sons Benjamin and John Thomas should own the farm in equal shares, and but for the ignorance of all parties to the transaction, including the scrivener, a written instrument would have been prepared and signed to evidence that intent. However, the proof is satisfactory that, subsequently to the execution of the deed, Benjamin's possession was under a claim of right; he made lasting and valuable improvements on the farm and not only tilled the soil, but assumed authority to place his married children in possession of the land. Ordinarily such acts would reasonably be referable to a claim of right; but it is said that, because of the peculiar circumstances of this case, we should not so hold. But we find declarations of John Thomas, made at different times to within two years of his death, admitting by inference or directly his brother's interest in the land. In 1897, but two years after the deed was executed, John Thomas requested a third party to prepare a deed to convey all of the title to Benjamin, saying that "He ought to have it (the land)," and solely because the proposed scrivener desired to go home to luncheon, and the subsequent attraction of a ball game, that purpose was not consummated. John Thomas refused to sell part of the land because, as he said, it was always to remain in the Fisher family. This statement may indicate a testamentary intention, but it sheds some light on the controversy. Within two years of John Thomas' demise, in discussing the location of a ditch on the farm, he said in substance that he did not know whether Benjamin wanted the ditch constructed along

the proposed path, and that he and Benjamin owned the land together. There is some evidence of John Thomas' declarations to the contrary, and also Benjamin's declarations evincing a disclaimer of any interest in the land; but, taking all of the evidence together, we find that at all times subsequently to the execution of the deed to John Thomas, Benjamin Fisher asserted ownership to at least an undivided one-half of this land, and, in reliance upon his belief and contention that his mother intended that he should have an interest in the land, made lasting and valuable improvements thereon, and, with his brother John, held undisputed possession of the premises for more than ten years preceding the commencement of this action and subsequently to his mother's death, and during all of that time John acquiesced in that claim. A tenancy in common may be created by prescription. *Inglish v. Webb*, 117 Ala. 387. This estate in Benjamin was not created so much by a disseizin of his brother John, as by John's recognition of his mother's trust and confidence in him and his respect for his brother's rights. There was in effect an execution by him of the trust reposed in him by her, and, that trust having been fully executed and respected by him for more than ten successive years, not only should the ten year statute of limitations (code, secs. 5, 6) bar a recovery, but the case is within the principle announced in *Karr v. Washburn*, 56 Wis. 303, and *Oberlander v. Butcher*, 67 Neb. 410.

This brings us to the contention between the half-bloods and the descendants of Elizabeth Fisher; the one faction contending for an estate of inheritance because the deed from Elizabeth Fisher is one of purchase, and the other side asserting that the deed is one of gift, and, hence, by the terms of section 33, ch. 23, Comp. St. 1911, which provides that an estate of inheritance which vested in an intestate by devise or gift from some of his ancestors shall descend from him solely to such of his relatives as are of the blood of that ancestor, the line of descent is confined to the heirs of the full-blood.

We do not think that the execution of the mortgage and the use of the funds acquired thereby should control the character of Mrs. Fisher's deed. The money was secured for the benefit of Benjamin Fisher and John Thomas Fisher, and in effect they mortgaged their land to secure the payment of their debt. Rather this controversy depends upon the right of the heirs of the full blood to contradict by oral evidence the recital in the deed from Elizabeth Fisher that she was paid \$2,000 therefor.

A majority of the court instructed me to say that oral evidence is admissible to prove the actual consideration for a deed, even though the effect may be to convert the instrument from one of bargain and sale into one of pure gift; such proof has always been considered competent in other actions, and a majority of the court does not think sound sense should permit an exception to be made in a case where, to do so, is to compel the court to hold contrary to the fact, and thereby render ineffectual a plain provision of the statute. Such evidence, although admissible, should not be held to prove the fact, unless it is clear and convincing and leaves no reasonable doubt in the mind concerning the consideration given for the deed.

The courts of last resort are not in harmony in cases like the one at bar. The following cases directly sustain the majority of this court: *Bradley v. Love*, 60 Tex. 472; *Rockhill v. Spraggs*, 9 Ind. 30; *Jones v. Jones*, 12 Ind. 389; *Kenney v. Phillipy*, 91 Ind. 511. See, also, *Sires v. Sires*, 43 S. Car. 266, and *Salmon v. Wilson*, 41 Cal. 595.

The writer of this opinion, while recording the views of a majority of the court, personally holds to the contrary. That is to say, that while for many purposes recitations in a deed may not, even as between the parties and their privies, be conclusive evidence of the facts, and the recitation of consideration is frequently held to be solely *prima facie* evidence of the fact, yet it seems to me that, both upon reason and the better authority, persons claiming under a deed should not, in the absence of fraud, or mutual mistake, be permitted to prove by oral evidence

that a recitation of a substantial, valuable consideration, where no other consideration is referred to in the deed, is false, and prove by the oral evidence that the sole consideration was good so as to change the quality of the estate thereby conveyed. In such cases the recitation gives quality to the estate transferred, and, to contradict it by oral evidence, violates the statute of frauds and perjuries. *Patterson v. Lamson*, 45 Ohio St. 77; *Brown v. Whaley*, 58 Ohio St. 654; *Groves v. Groves*, 65 Ohio St. 442.

Among the cases cited to sustain the majority of the court *Bradley v. Love*, *supra*, is directly in point, but the opinion is a mere declaration that the law is as stated and contains no convincing argument to sustain the conclusion. The later Indiana cases follow *Rockhill v. Spraggs*, 9 Ind. 30, and it was decided on the authority of *M'Crea v. Purmort*, 16 Wend. (N. Y.) 460. The New York case, however, merely involved the right of a party to a deed to prove that the consideration therefor was a quantity of iron delivered by the grantee to the grantor, rather than a money consideration, as recited in the deed. That case was correctly determined, but does not sustain the Indiana cases, nor the majority opinion in the instant case.

In *Salmon v. Wilson*, 41 Cal. 595, in addition to a recitation of a nominal valuable consideration, there was a recitation of a good consideration, and it was held that, upon a consideration of the entire instrument, the court should construe the deed to be one of gift.

In *Carty v. Connolly*, 91 Cal. 15, that court recognize the rule that, in the absence of fraud, oral evidence should not be received to contradict the recitation of consideration for the purpose of defeating the conveyance according to its terms. In the case at bar the testimony is convincing that the sole consideration for the deed was that of love and affection, and we conclude, upon a consideration of the entire record, that substantial justice has been done.

The judgment of the district court, therefore, is

AFFIRMED.

SEDGWICK, J., concurring.

The foregoing opinion was prepared by Judge Root while he was a member of the court, and is now adopted as a correct disposition of the case. The most serious contention in the case is determined by the second paragraph of the syllabus. The general rule is that the consideration expressed in a written instrument may be inquired into, and that it may be shown by parol testimony to be without consideration, although such consideration is recited in the instrument. The adjudicated cases are in conflict and each view is supported by many decisions. We think that the better reasoned decisions hold that the general rule obtains in cases of this kind. If there was a valuable consideration for the deed, the property goes, upon the death of the grantee, to his heirs in general. If the deed was in fact a gift from an ancestor of the grantee, the property upon the death of the grantee descends to those who are "of the blood of such ancestor." When the ancestor makes a gift to his descendant, and recites in the deed of gift that a valuable consideration was paid therefor, this recitation on his part may be for the purpose of controlling the line of descent of the property. We know, however, that in practice this recitation is often made in deeds for other and different purposes, or it may be carelessly made without any purpose whatever. If the conveyance is in fact a gift, and the ancestor desires to qualify the estate conveyed and control the line of descent, he can do so by inserting in the conveyance apt and conclusive words for that purpose. If the ancestor desires to make disposition of his property that shall take effect after his death, or to place limitations upon the title derived through him, he can accomplish these results through a gift of the property by will, and the law favors that method of making such posthumous limitations. It is not usual in practice to qualify the estate conveyed by so uncertain a method as recitations of consideration, and to adopt such methods would lead

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to uncertainties in titles to real estate. We think, therefore, the better reason is in favor of the rule which we have adopted.

THOMAS M. REED, APPELLEE, v. ELI B. FISHER ET AL.,
APPELLANTS.

FILED JANUARY 24, 1912. No. 16,582.

Judgment: CANCELANON OF SATISFACTION: MISTAKE. A plaintiff who, without any consideration whatever, satisfied a judgment in his favor, mistakenly believing that the debt had been paid by means of a worthless deed to land on which the judgment was a lien, may have the satisfaction canceled, where no right of any innocent party has intervened.

APPEAL from the district court for Sherman county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

W. J. Fisher and Aaron Wall, for appellants.

R. J. Nightingale, contra.

ROSE, J.

This is a suit in equity in which the trial court canceled the satisfaction of a judgment against Eli B. Fisher and William J. Fisher, defendants herein, on a petition alleging that plaintiff, without consideration, through fraud and mistake, had discharged his lien. Defendants have appealed.

In a former action at law plaintiff recovered a judgment for \$50 against Eli B. Fisher, who, to prevent collection thereof, had previously deeded an undivided sixth of a quarter section of land to his brother, William J. Fisher. The deed, though binding on the parties to it, was, by decree of court, canceled as to plaintiff, and the realty subjected to the payment of his judgment in a subsequent suit in equity, wherein he was plaintiff and both

of the Fishers named were defendants. Assuming that the decree had restored the title to the fraudulent grantor, plaintiff accepted from him a deed to the land and satisfied his judgment lien thereon, mistakenly believing the judgment debt had been thus paid. The result was that he did not acquire title or receive anything else of value, and lost his lien—the fruit of an action at law and a suit in equity. William J. Fisher, though he parted with nothing and lost no legal right when the satisfaction was entered, clung to the title obtained from his brother without consideration, refused to deed the land to plaintiff, kept him out of possession and prevented him from participating in the rents and profits arising from the land. What the trial court did in the present case—another suit in equity—was to strike off plaintiff's entry of satisfaction and reinstate his lien on the land described.

Defendants seek a reversal on two grounds: (1) The cancelation is an attempt to relieve plaintiff from his own mistake of law. (2) The action is barred by the statute of limitations.

1. Was the mistake one of law or fact? Was it mutual? While these questions were subjects of animated debate, the correctness of the cancelation can be tested by two propositions about which there is no dispute in the record: Plaintiff made the mistake of assuming that the judgment debt was paid when he satisfied his lien. The deed which he accepted as a consideration for the satisfaction was absolutely worthless. It is therefore perfectly clear that no title was conveyed to him and that no debt was paid. When plaintiff accepted the deed, he received nothing and neither of the judgment defendants parted with anything. In equity that is not the way debts are paid or judgments satisfied. There is no intervening right of any third party to complicate plaintiff's equities. Both parties to the fraudulent conveyance were defendants in the suit wherein it was canceled as to plaintiff and they are also defendants here. It having been conclusively shown that plaintiff discharged his judgment

lien under the circumstances narrated, without any consideration whatever, the satisfaction was properly canceled. *Bowman v. Forney*, 15 Pa. Co. Ct. Rep. 134; *Hay v. Washington & A. R. Co.*, 11 Fed. Cas. 6255a; *Stewart v. Armel*, 62 Ind. 593; *Russell v. Nelson*, 99 N. Y. 119; *Watson v. Reissig*, 24 Ill. 281, 76 Am. Dec. 746.

2. Whether plaintiff knew, more than four years before he commenced this suit, that he had received no consideration for satisfying his judgment is an issue in dispute with proof on both sides. The trial court found for the plaintiff, and an examination of the entire record leads to the same conclusion on appeal.

AFFIRMED.

**BERTHA M. VOTAW, APPELLANT, v. HORACE E. VOTAW,
APPELLEE.**

FILED JANUARY 24, 1912. No. 16,587.

DIVORCE: EXTREME CRUELTY: QUESTION OF FACT. False accusations of marital infidelity may constitute extreme cruelty on the part of a husband making them, but whether a wife should be granted a divorce on that ground depends upon the facts of each case.

APPEAL from the district court for Lincoln county:
HANSON M. GRIMES, JUDGE. *Affirmed.*

Wilcox & Halligan, for appellant.

J. G. Beeler and Hoagland & Hoagland, contra.

ROSE, J.

Plaintiff sued her husband for a divorce on the ground of extreme cruelty. After proofs had been adduced at great length on both sides her action was dismissed, and she has appealed to this court for the relief denied below.

As husband and wife the parties lived together at North Platte for ten years. They have two children. Defend-

ant was a locomotive engineer on the Union Pacific railroad during nine years of their married life, but left the railway service, and thereafter devoted his time to the milling business at Maywood, a village located a few miles from North Platte. The family residence, however, was not changed, and defendant drove home from his mill once in a week or two. The proofs indicate that he had a phlegmatic temperament, and that his wife was affected by a nervous ailment described as cardiac neurosis.

December 1, 1908, defendant went home in the evening after dark and found company. A young woman who lived there, two young men invited by her, and plaintiff were playing cards. Plaintiff thought she heard her husband at the barn, went to greet him, and called his name, but he gave her a surly answer and soon approached her at the house in a jealous rage. The guests soon left. He falsely accused his wife of criminal intimacy with one of the young men who was there when he arrived. The children cried. The mother screamed, and finally, as a result of the false accusation and the accompanying ordeal, went into convulsions. In the meantime neighbors heard the commotion and tried to call a policeman. A woman pounded on the house outside, but, failing to quiet the storm within by that means, entered and upbraided defendant in his own home. He denies that he accused his wife of marital infidelity, but he admitted on cross-examination that the false imputation had been in his mind. If the words employed by him did not contain the accusation in direct terms, they nevertheless imputed the false charge. They were so understood by his wife, and the cruel thrust was no less painful on account of the form in which it was delivered. After his anger had subsided, he confided to his wife the secret that he had thought of going down town for a revolver, with the purpose of ending his own life and that of another. Plaintiff understood that she was included in the contemplated tragedy, but he denies that he ever had any intention of harming her. A week later he came home in the evening

and saw his wife with one of the children going to the next-door neighbor's. He imagined his child was a man, and inquired afterward of the children and of the young woman who stayed at their home who the man was. The same evening he went down town, after having refused to tell his wife why he was going. Fearing he would return with a revolver, she fled with her children to the home of a sister who lived in the neighborhood. The sister armed one of her sons with a revolver and put him on guard in a bedroom. Defendant came a little later, and from the outside called the sister by name. Not receiving any response, he broke in a door, entered the house, and inquired for his wife and children. An interview with plaintiff was arranged, and resulted in another case of neurasthenic prostration.

There are circumstances under which a false accusation of marital infidelity may constitute "extreme cruelty" within the meaning of that term as used in the statute relating to divorce, but whether a divorce should be granted on that ground depends upon the facts of each case. *Sample v. Sample*, 82 Neb. 37. The law being as thus stated, counsel for plaintiff were somewhat astonished at the trial court's refusal to grant her relief, but the explanation is to be found in other facts. Reprehensible as defendant's behavior was, its enormity and plaintiff's danger were exaggerated in her own mind by her nervous disorder. Thus magnified, her wrongs were communicated to her children and to her sister. It is perfectly apparent from the record that defendant loves his wife and children. Her own proof indicates that no suspicion of her infidelity had ever before entered his mind. His misconduct occurred in December, and he was sued in January following. There is no evidence of cruelty at any other time. When his wife was prostrated he sent for a physician and cared for her. He tried to restore former relations. He acknowledged the wrong he had done. He went to the young man of whom he had entertained the unfounded suspicion, and to others, and

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admitted his fault, with the hope of arresting the scandal he had started and of enlisting their aid in his efforts to win back his wife's affections. He broke into the home of his wife's sister for the same purpose. She was reassured by his appearance and statements and felt no danger, though a few minutes earlier she had armed her own son for plaintiff's protection. Considering defendant's disposition, his attempts to make reparation and to pacify his wife were pathetic.

From the evidence it seems that, when defendant was returning from Maywood, he met on the highway a woman who told him his wife and children had been out riding, and that their companions included the young man already mentioned. When he reached home, a horse hitched to a two-seated conveyance was standing in front of his house. There was gaiety within and the young man was there. Defendant's anger and the false accusation followed. According to the greatest of dramatists, "Trifles light as air are to the jealous confirmations strong as proofs of holy writ." Though defendant had been schooled in the dangers of the engineer's cab, he lost his head as soon as jealousy crept into his bosom. The conditions disclosed will not prevent the parties from resuming their former relations. While his jealousy was no justification for his misconduct, the circumstances show that he did not deliberately make the charge, believing it to be false. He did not repeat it, but tried to make amends. These considerations no doubt appealed strongly to the trial court, and the judgment of dismissal is here adopted as correct.

AFFIRMED.

ROBERT B. SMITH, APPELLEE, v. GEORGE B. MCKAY,
APPELLANT.

FILED JANUARY 24, 1912. No. 16,641.

1. **Appeal: CONFLICTING EVIDENCE.** The finding of a jury on conflicting evidence will not be disturbed on appeal unless manifestly wrong.
2. ———: **HARMLESS ERROR.** Rulings which did not prejudice appellant in any way cannot be made grounds of reversal.

APPEAL from the district court for Dawson county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

George C. Gillan and H. D. Rhea, for appellant.

T. M. Hewitt and W. A. Stewart, contra.

ROSE, J.

The petition contains two causes of action. In the first the sum of \$343 is demanded for making a concrete foundation and cement floor for a building in Lexington according to the terms of an oral contract between plaintiff and defendant, and the second is a claim consisting of four items, amounting to \$16.75, for labor and materials furnished in locating and repairing the foundation mentioned. Defendant in his answer admits that the oral agreement was made, but alleges that plaintiff violated it by making the foundation too narrow for the building planned. The second count is answered by a plea of payment. Defendant also filed a cross-petition in which he demanded \$550 as damages for plaintiff's failure to make the foundation the specified width. The jury found in favor of plaintiff on the first count for the full amount of his claim, and on the second for \$7.37. From a judgment for the sum of these amounts and interest defendant has appealed.

It is argued as a ground of reversal that the evidence is insufficient to sustain the verdict. The principal ques-

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tion litigated is: Did the foundation and floor as completed conform to the stipulated dimensions? On conflicting proof, with abundant evidence to sustain the verdict, the jury determined that issue in favor of plaintiff, and thereby settled it for the purposes of review.

In relation to the claim for damages pleaded in the cross-petition, defendant complains of instructions and of rulings on evidence. If the trial court made mistakes in those particulars, the errors were harmless, because the jury found on an issue properly submitted that plaintiff did not violate the oral agreement in any way. Since it is established that plaintiff complied with the contract, defendant is not entitled to recover damages based solely on allegations that he violated it. No prejudicial error appearing, the judgment is

AFFIRMED.

**JOHN S. IMAN, APPELLEE, v. JOHN R. INKSTER ET AL.,
APPELLANTS.**

FILED JANUARY 24, 1912. No. 16,943.

1. **Pleading: PETITION: AIDER BY ANSWER.** A petition omitting material averments is cured by an answer supplying them.
2. **Partnership: ASSETS: GOOD WILL.** The good will of a dissolved partnership is a part of the assets of the firm.
3. ———: **SETTLEMENT: OMITTED ITEM: ACTION AT LAW.** A partner's share of the value of a single asset not included in the settlement of the partnership affairs, as made by his partners without his knowledge, may be recovered in an action at law.
4. **Trial: TRIAL TO JURY: PLEADINGS.** The trial of an issue of fact to a jury in an action at law should not be abandoned because the pleadings as a whole contain matter relating to an accounting about which there is no dispute between the parties to the suit.
5. **Partnership: NEGLECT OF PARTNER: FORFEITURE.** A partner by merely neglecting his duties to the firm does not thereby forfeit his right to the assets of the partnership, in absence of an agreement to that effect.

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6. Trial: VERDICT: IMPEACHMENT. Matters inhering in the verdict of a jury cannot afterward be attacked by affidavits of the jurors.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Affirmed.*

McCoy & Olmsted, for appellants.

Charles Battelle and B. S. Baker, contra.

ROSE, J.

This is an action at law to recover from John R. Inkster and James S. Van Zant, defendants, \$15,000, the alleged share of John S. Iman, plaintiff, in the value of the good will of the Nebraska Live Stock Company, a dissolved partnership which had been composed of the three persons named. The jury rendered a verdict in favor of plaintiff for \$4,123.16. To prevent the granting of a new trial, plaintiff filed a remittitur for all of that sum except \$1,000, for which judgment was entered in his favor. Defendants have appealed.

The firm had been buying and selling live stock on commissions at South Omaha. From the standpoint of plaintiff, as shown by his pleadings and proofs, defendants, during his absence on firm business and for his own pleasure, dissolved the partnership without his consent, ousted and excluded him therefrom, incorporated under the same name, continued business in the same offices, made use of the same exchange and stock-yard privileges, appropriated to themselves the good will of the partnership, and sent him a statement that they had balanced the books, paid the debts and sold the tangible assets. The account rendered by defendants showed that plaintiff owed them \$1,743.38, but did not include in the list of assets the good will of the partnership. At the trial plaintiff did not controvert any item in their statement, but made proof of facts tending to show defendants' liability for the single item of good will omitted from the account, its value and his own share thereof.

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Defendants, according to their pleadings and proofs, take the position that any partner had a right to terminate the partnership at will; that plaintiff had violated his contract with defendants by failing to devote his entire time to the business of the firm and by buying and selling stock on his own account; that by his own wrong, in thus neglecting his duties to the firm and in violating his contract with defendants, he destroyed any good will which the partnership had enjoyed; that he left the state early in July, 1908, without the consent of defendants, dissolved the partnership and abandoned any interest he might have had in the good will of the firm; that he afterward engaged in a separate business on his own account; that by a letter written in Montana and received by them July 30, 1908, he informed them that he had abandoned and dissolved the partnership; that, upon learning of such abandonment and dissolution, defendants settled the affairs of the partnership, notified plaintiff thereof and sent him a dissolution statement, which did not include good will because it was of no value; and that plaintiff by accepting that part of the settlement beneficial to him is estopped to assert his claim for good will.

The petition is assailed as fatally defective for these reasons: Final and complete settlement of the partnership affairs is not alleged. It is not shown that the action is based on a single item growing out of such a settlement, nor that there are no other unsettled accounts or unpaid debts. If there is anything wanting in these particulars, it will be found in punctilious form in the answer of defendants. A petition omitting material averments is cured by an answer supplying them. *Haggard v. Wallen*, 6 Neb. 271; *Railway Officials & Employees Accident Ass'n v. Drummond*, 56 Neb. 235; *Beebe v. Latimer*, 59 Neb. 305; *Chicago, R. I. & P. R. Co. v. Kerr*, 74 Neb. 1.

When the pleadings are all considered, a cause of action for plaintiff's share of the good will is stated. It is settled law in this state that the good will of a dissolved partnership is a part of the assets of the firm. *Nelson v.*

Hiatt, 38 Neb. 478; *Sheppard v. Boggs*, 9 Neb. 257. A partner's share of the value of a single asset not included in the settlement of the partnership affairs may be recovered in an action at law. *McAuley v. Cooley*, 45 Neb. 582. The liability of defendants to plaintiff for his share of the good will of the partnership is fairly put in issue by the pleadings. At the trial plaintiff confined his proofs to that issue, and he did not contest any item in the account stated by defendants. His claim for good will was therefore presented, as a single item, under well-established principles.

Defendants further argue that there should have been no jury trial because the petition states a case between partners for an accounting. There is no merit in this point. As the case was presented by all of the pleadings, defendants had made their own accounting, and there was no controversy on that subject, except as to the omitted item of good will—the proper basis for an action at law. The trial court very properly declined to abandon the controverted issue at law for an accounting in equity already made by defendants and approved by plaintiff.

The petition was assailed by demurrer and by motion for judgment in favor of defendants *non obstante veredicto*. In that way both the pleadings and the evidence are attacked as insufficient to sustain the judgment. It is also argued in this connection that plaintiff's case is defeated by estoppel. These views, however, cannot be adopted. The letter pleaded by defendants to show that plaintiff abandoned and dissolved the partnership does not, as a matter of law, justify their interpretation. The evidence is sufficient to support a finding that he did not voluntarily dissolve the partnership, either by his letter or by other conduct, and that the good will was a valuable asset. The haste with which defendants, in the absence of plaintiff, settled the affairs of the partnership, pursued the same business in a new form under the same name in the same office with the same privileges, is convincing proof that, in their judgment, the good will had

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not been destroyed by plaintiff and that it was an asset worth having. In any event the jury, on ample evidence, found that the good will was a valuable asset. If the partnership was dissolved by defendants without the consent of plaintiff, he did not abandon his right to his share of the good will or estop himself from demanding it. That asset stood on the same footing in the settlement of partnership affairs as the tangible property listed by defendants. If plaintiff failed to devote all of his time to the business of the firm and engaged in other business, as charged by defendants, he did not thereby forfeit his interest in the good will any more than in the office furniture or in other property listed in the settlement. He had nothing to do with the transferring of the assets of the firm to defendants or with the stating of the account. He had a right to acquiesce in the settlement as far as it went, and to sue for his share of the omitted asset of good will.

Complaint is also made that the jury were guilty of misconduct in disregarding the evidence and in disobeying the instructions with respect to giving defendants the benefit of plaintiff's indebtedness to them as settled by the undisputed account. Defendants attempted to show this misconduct by the affidavits of the jurors themselves. The attack so made related to matters inhering in the verdict itself, and the jurors could not impeach it in that manner. *Gran v. Houston*, 45 Neb. 813; *Johnson v. Parrotte*, 34 Neb. 26; *Welch v. State*, 60 Neb. 101. The finding of the jury on the measure of recovery, however, was not accepted by the trial court, but was reduced from \$4,123.16 to \$1,000—a sum fully sustained by the evidence.

The case was fairly submitted to the jury. They were not permitted to find in favor of plaintiff unless his share of the good will, if any, exceeded his indebtedness to defendants, as shown by their own account. No prejudicial error has been found in the rulings on evidence or elsewhere in the record.

AFFIRMED.

CASS COUNTY, APPELLANT, v. SARPY COUNTY, APPELLEE.

FILED JANUARY 24, 1912. No. 16,842.

1. Appeal: SUFFICIENCY OF EVIDENCE: ESTOPPEL BY ACTS. Where at the close of a trial in the district court, plaintiff, without any motion for a directed verdict, or objection of any kind that the evidence is insufficient to sustain a verdict in favor of defendant, requests instructions upon a material issue of fact in controversy, which are given by the court, he will not thereafter be heard to say that an adverse finding thereon is not sustained by sufficient evidence.
2. ———: ———: ———: SEVERAL ISSUES. But where no special findings are submitted to the jury, and there are two or more material questions involved, upon either of which the verdict might have been based, the fact that the defeated party is, by having requested instructions, estopped to question the sufficiency of the evidence upon one point does not estop him from questioning the sufficiency of the evidence to sustain the verdict on other points, upon which no instructions were requested by him.
3. ———: VERDICT: AMBIGUITY. The record examined, and held to leave the matter in doubt upon which of the material issues in controversy the verdict is based.
4. Bridges: REPAIRS: NEW STRUCTURE. Evidence examined and referred to in the opinion held insufficient to sustain the verdict of the jury upon point 7.

APPEAL from the district court for Sarpy county:
ALEXANDER C. TROUP, JUDGE. *Reversed.*

Calvin H. Taylor, for appellant.

W. N. Jamieson and John F. Stout, contra.

FAWCETT, J.

This case is before us for the fifth time. The history of the case and of the matters in controversy will be found in our former opinions reported in 63 Neb. 813, 66 Neb. 473 and 476, and 72 Neb. 93. The last trial was held at the February, 1910, term of the district court for Sarpy county. There was a trial to the court and a jury and a

verdict for defendant. Judgment on the verdict. Plaintiff appeals.

The only contention made here is that the verdict is not sustained by the evidence. In his brief counsel for plaintiff states that it is only necessary to discuss the following questions: "(1) Whether or not at time of making the repairs by plaintiff, in 1900, on the bridge in question, the same was a public wagon bridge and formed and was used as a part of the public highway. (4) The reasonable value of the repairs so made necessary to put said bridge in safe condition for public travel. (7) The issue was also raised by the pleadings as to whether or not said bridge was actually repaired, or whether it was not a new construction so as to render defendant not liable."

Under the rule announced by this court in *American Fire Ins. Co. v. Landfare*, 56 Neb. 482, *Farmers Bank v. Garrow*, 63 Neb. 64, and *Missouri P. R. Co. v. Hemingway*, 63 Neb. 610, plaintiff is not in a position to urge the insufficiency of the evidence to sustain the verdict on point 1. At the conclusion of the trial plaintiff, without any motion for a directed verdict or objection of any kind that the evidence was insufficient to warrant a verdict in favor of defendant, requested, and the court gave, instructions 3 and 4, covering the question involved in point 1. The verdict having been adverse to plaintiff, it cannot now be heard to assert that there was not sufficient evidence upon that point.

Point 4 need not be considered, for the reason that, the verdict having been for defendant, the question of the reasonable value of the repairs is immaterial for the purpose of this review.

The rule above announced, and held to be applicable to point 1, has no application to point 7, for the reason that no instructions upon that point were requested by plaintiff. As no special findings were submitted to and returned by the jury, it is impossible to say upon which of these two points the verdict of the jury was based. If upon point 7, we think the contention of plaintiff, that

the verdict was not sustained by the evidence, is sound. The evidence in this record, that the bridge was not a new bridge but was simply an old bridge repaired, is much stronger than in *Brown County v. Keya Paha County*, 88 Neb. 117, where the same contention was made as here, but where we held that plaintiff's claim was for repairs; and upon the record before us we must hold the same here. According to the testimony, there never was a day when this bridge was not used. It even shows that at the very time they were making the repairs teams were crossing. One witness testified that, "during the time we were repairing it, we let no teams go across there only at 12 o'clock, at noon, and after 6 o'clock, just one day the teams that were waiting there amounted to about 80 teams." The evidence shows that the length of the bridge was about 2,800 feet; that there were in round numbers 508 piling, 889 stringers and 127 caps used in its original construction. In making the repairs, only 11 new piling, 551 stringers and 49 caps were used. That the floor was all new, that no one section of the bridge was left standing complete and without repairs, and that the piling left in the bridge was old piling which had been there for a number of years does not change the character of the work done. It would be useless to quote the testimony at large upon this point. Viewed from any standpoint, it is entirely insufficient to sustain the contention that this was a new structure, and upon point 7 the verdict is without sufficient evidence to sustain it. Being unable, as above indicated, to determine upon what theory the jury returned their verdict, it should not, in the face of the apparent merit of plaintiff's claim, be permitted to stand. That this bridge was a part of a highway, which the public generally, in both the plaintiff and defendant counties, used and had used for nearly ten years is beyond question. That there may be some slight question as to whether the lands in the approaches to the bridge had been dedicated to public use by the owners, or legally condemned and opened as a public road, should not weigh

against the more important fact that the bridge has been used as a part of the public highway for so many years.

The question as to the right of plaintiff to a change of venue is not properly presented by this record. If it were, we might be constrained to hold that plaintiff is entitled to have the venue changed, and the case submitted to a jury free from any local interest or prejudice. The verdict of the jury indicates the propriety of such a course.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

BARNES, J., dissenting.

I am unable to concur in the opinion of the majority. It appears that the only contention on this appeal is that the verdict is not sustained by the evidence. The main question involved in the trial of this case was whether at the time the alleged repairs were made the bridge in question was a public wagon bridge which was in use as a part of a public highway. This was the primary fact necessary to be established in order to sustain a recovery. The record discloses that the bridge had not been in use for the full period of ten years at the time of the repair or reconstruction for which recovery is sought. It follows that no rights were obtained under the statute of limitations. It appears that at both ends of the bridge the title to the property abutting upon the river banks was in private parties. The evidence is not entirely clear that the lands which constituted the approaches to the bridge had been dedicated to public use by the owners, or legally condemned and opened as a public road. At the conclusion of the trial plaintiff, without any motion for a directed verdict, and without objection of any kind that the evidence was insufficient to warrant a verdict in favor of the defendant, requested the court, by proper instructions, which were given, to submit the main question, above stated, to the jury. This having been done, and the jury having returned a verdict for defendant, counsel for the appellee insists that plaintiff, by causing the sub-

mission of the main question to the jury, under the well-established rule in this state, cannot now claim that an adverse finding upon this question is not sustained by sufficient evidence. The question submitted at the request of the plaintiff was the material one, under the pleading, and if decided adversely to the plaintiff it could not recover. In *American Fire Ins. Co. v. Landfare*, 56 Neb. 482, it was held: "One who tenders an instruction which is given, which assumes the existence of evidence to establish an issuable fact in the case, cannot afterwards be heard to assert that there was no evidence received tending to prove such fact." This rule was followed in *Farmers Bank v. Garrow*, 63 Neb. 64, and *Missouri P. R. Co. v. Hemingway*, 63 Neb. 610, and is so well settled that it ought not to be disregarded at this time.

The main issue in this case having been submitted to the jury upon instructions prepared and tendered by the plaintiff, and the jury having found against it upon the evidence, such finding should conclude the plaintiff, and terminate this litigation. As stated in the majority opinion, this is the fifth time that this case has been before us. There should, at some time, be an end to litigation. Therefore, I am of opinion that the judgment of the district court should be affirmed.

ROSE, J., joins in this dissent.

GIRARD TRUST COMPANY, TRUSTEE, APPELLEE, V. HENRY NULL ET AL.; WALTER V. HOAGLAND, APPELLANT.

FILED JANUARY 24, 1912. No. 16,998.

Acknowledgment, Authority to Take. A notary public is not disqualified from taking an acknowledgment of a mortgage made to a loan company, merely because it is shown that he was at the time local agent of the mortgagee, it not appearing that he was a stockholder in such company or otherwise beneficially interested

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in having the mortgage made. Nor would the fact that such mortgage was executed as a renewal of a prior mortgage, in which such notary had an indirect interest, disqualify him, it not appearing that the execution of such renewal mortgage operated to his benefit in relation to his indirect interest in the original mortgage.

APPEAL from the district court for Lincoln county:
HANSON M. GRIMES, JUDGE. *Affirmed.*

H. P. Leavitt and Hoagland & Hoagland, for appellant.

Albert Muldoon, contra.

FAWCETT, J.

From a decree of the district court for Lincoln county, awarding the plaintiff a foreclosure of its mortgage upon the northeast quarter of section 10, township 16, range 29, in said county, defendant Walter V. Hoagland appeals.

The record shows that Henry Null, originally one of the defendants in this suit, proved up on the land in controversy as a government homestead, and was residing there with his family, claiming it as a homestead, at the times of the execution of all of the instruments hereinafter referred to. May 1, 1887, Null mortgaged the land to the Central Nebraska Loan & Trust Company for \$350. T. C. Patterson was president and a director and stockholder in that company. December 1, 1888, Patterson, as the agent for McKinley-Lanning Loan & Trust Company, which for brevity will be designated as the McKinley Company, obtained for the Nulls from that company a loan of \$500 for five years at 10 per cent. per annum. To secure this loan two mortgages were executed by the Nulls and acknowledged before Mr. Patterson as notary public, the principal mortgage being for \$500 with 7 per cent. interest, payable semi-annually, and the other, called a commission mortgage, being for \$75, which represented the other 3 per cent. of interest for the five years.

At the time of executing these mortgages, Mr. Patterson had a contract with the McKinley Company, by the terms of which, for loans of this character, he was to receive one-half of the commission represented in the smaller mortgage, when the principal mortgage was paid. When the mortgage to the McKinley Company matured in 1893, the Nulls executed to that company the mortgage in suit, as a renewal of the former mortgage, and at the time of its execution they also executed a mortgage for \$75, representing the additional 3 per cent. of interest, as was done on the former occasion, these two mortgages also being acknowledged before Mr. Patterson. Subsequently, and before maturity, the mortgage in suit was assigned by the McKinley Company to the plaintiff. On July 17, 1907, Henry Null and wife by special warranty deed conveyed the land in controversy to defendant Hoagland. The covenant in the deed is "that the said premises are free and clear of all liens and incumbrances, and we do hereby covenant to warrant and defend the said premises against the lawful claims and demands of all persons claiming by, through, or under us, and against no other claims." The undisputed evidence shows that at the time of the execution of this deed the land was worth from \$1,200 to \$1,600. The only testimony shown in the abstract with reference to the execution of this deed and the consideration paid by Mr. Hoagland therefor is in the testimony of Mrs. Null. She testified that they lived on the land, rented it about two years, and sold it to Mr. Hoagland. "I do not remember what he paid. He paid me some money, but not much, because we sold it to him with the mortgage on it. I did not get much, I think about \$225. I think in cash. Q. And you sold it because there was a mortgage on the land and that it was not paid, and that he would have to fight it? A. Yes, sir. Q. And he got to help you? A. Yes, sir. Q. You mean that he was to fight the mortgage? A. Yes, sir; we talked it all over."

The brief of defendant contains five specific assignments of error. We will consider these in their order.

1. That there is not sufficient evidence in the record to show that plaintiff is the owner of the mortgage in controversy and entitled to maintain this suit: Under this head the rulings of the court, in the admission of certain exhibits, are assailed, and the argument advanced that no sufficient foundation was laid for their admission. The record is so clearly against defendant upon this point that nothing would be gained by reviewing it.

2. That the mortgage contract sued upon was usurious: This contention must fail for the reason that the evidence is entirely insufficient to sustain it.

3. That plaintiff's action is barred by the statute of limitations: Upon this point it is sufficient to say that the facts upon which defendant's argument is based do not appear in the record.

4. That the land covered by the mortgage was the homestead of the Nulls at the time of the execution of the mortgage, and that the mortgage was void because Mr. Patterson, who took the alleged acknowledgment, was incompetent to take the same: The rule of law that one who has an actual pecuniary interest in a mortgage is incompetent to take the acknowledgment of the mortgagors thereto is well settled, as contended for by defendant. The question here is, did Mr. Patterson have such an interest in the mortgage in suit? That he had such an interest in the mortgage executed to the McKinley Company in 1888 is probably true. But at the time that mortgage was executed there was executed simultaneously therewith and as a part of the same transaction the commission mortgage for \$75, one-half of which, under his contract with the McKinley Company, belonged to Mr. Patterson. If the evidence showed that he had a like interest in the commission mortgage given five years later and simultaneously with the mortgage in suit, defendant's contention would have to be sustained. The undisputed testimony of Mr. Patterson upon that point is that his contract with the McKinley Company, for compensation on loans, applied only to original loans and did not extend to re-

newals thereof; that he had no interest whatever in the mortgage in suit, or in the commission mortgage executed in connection therewith; that his contract with the McKinley Company was in writing; that he did not have the contract, but could state substantially the contents of it; that "the contract was to the effect that I would get compensation for my services of one-half the commission notes, I had no interest whatever in the loan, or any in the principal, but in the commission notes I was to get one-half, when the loan and principal notes were canceled, then I was entitled to one-half. These commission notes represented 3 per cent. of the 10 per cent. interest on the loan; that contract applied to original loans, but not renewals. Nothing was said in the original contract with reference to renewals. In correspondence afterwards, with McKinley-Lanning people, attention was called to that, and it was understood that I had no interest in renewals. I guaranteed the original loan, and to that extent, but had no recompense out of it. I guaranteed to the extent of my share of the commission. I was not entitled to anything unless the original loans were paid and the commission notes paid, then I was entitled to one-half of the commission. When I made renewals I took 3 per cent. mortgages just the same as I did before. My contract ceased when I made the original loan. Q. Was there anything in your written contract that provided when it should cease? A. Nothing in my original contract provided anything about renewals. I was to have my interest in the commission notes upon the original loan. When I took renewals I had no interest in the loan whatever. If the proceeds of the loan went to pay the original loan, of course, in that way I would get a benefit out of it. I would get a benefit in the payment of my commission. What I have testified to is substantially my relation with the McKinley-Lanning Loan & Trust Company, during the time I was transacting their business, as agent for them here." On cross-examination he testified: "In the principal loan and mortgage to McKinley-Lanning

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Loan & Trust Company, I had no interest whatever. I had a contingent interest in the \$75 note and mortgage, and the agreement as to any interest in these loans applied wholly to the original mortgage. Referring to exhibits 2 and 3, the note and mortgage to the McKinley-Lanning Loan and Trust Company, dated December 1, 1893 (the mortgage in suit), I had no interest whatever. Q. Did you receive personally any part or portion of the loan of \$500 or any of the interest accruing thereon, either commission or the original loan? A. I received personally no part or portion of the original loan of \$500 only what was necessary to pay expenses, such as taxes, etc., and nothing for services or otherwise that I rendered for and on behalf of the McKinley-Lanning Loan & Trust Company. I received nothing except reimbursements for actual expenses." There is nothing in the record even tending to contradict this testimony by Mr. Patterson. There is no evidence to show that the commission mortgage taken in 1888, in which Mr. Patterson had a half-interest, was paid by or through the mortgage in suit. In the light of this testimony, we think the district court was right in holding that Mr. Patterson had no interest in the renewal commission mortgage. If he had no interest in that, it is clear that he had none in the principal mortgage—the mortgage in suit. This contention of defendant must therefore fail.

5. That the district court erred in finding that, because defendant bought the property in controversy, of the value of \$1,200 to \$1,600, for \$225, "with the mortgage on it," the mortgage was a part of the consideration for the land, and therefore defendant "cannot be heard as to either of the defenses by him made," is, under our holding upon point 4, immaterial.

Upon a consideration of the whole case, we conclude that the judgment of the district court was right, and it is

AFFIRMED.

DAVID A. RUSSELL, APPELLEE, v. ELECTRIC GARAGE COMPANY, APPELLANT.

FILED JANUARY 24, 1912. No. 17,094.

1. **Appeal: HARMLESS ERRORS.** Record examined, and *held* to show no reversible errors of law.
2. **Negligence: SUFFICIENCY OF EVIDENCE.** The evidence examined and set out in the opinion, *held* sufficient to sustain the verdict of the jury and the judgment of the trial court.

APPEAL from the district court for Douglas county:
WILLIS G. SEARS, JUDGE. *Affirmed on condition.*

Francis A. Brogan and O. C. Redick, for appellant.

Smyth, Smith & Schall, contra.

FAWCETT, J.

Action for personal injuries alleged to have been received through the negligence of defendant in causing a collision of defendant's electric automobile with a hack driven by plaintiff. Verdict and judgment for plaintiff. Defendant appeals. We do not find any reversible errors of law in the record. The only debatable question is one of fact—the sufficiency of the evidence of negligence on the part of defendant.

At the close of plaintiff's case, defendant moved for a directed verdict, which motion was overruled. It is unnecessary to pass upon this ruling of the trial court, for the reason that defendant waived the error, if any, in such ruling by proceeding with the trial and introducing evidence upon the issues joined by the pleadings. At the close of all of the evidence, defendant again requested the trial court to direct the jury to return a verdict in its favor, for the reason that plaintiff had failed to show any negligence on its part which caused the accident and the resulting injuries to the plaintiff. The motion was, in our judgment, properly overruled. As the case then stood, it was clearly one for a jury.

The evidence is quite voluminous. So much so that it would unwarrantably extend this opinion to attempt to set it out at length. Summed up, it shows that plaintiff was driving along an important public street in the city of Omaha at about the hour of midnight. It was raining and the street somewhat slippery. The vehicles were traveling in the same direction, east, and at substantially the same rate of speed. At the point where they were traveling there was a slight down-grade, but there is no evidence to show that the street was not perfectly level north and south between the curbs. The driver of the electric car was entirely shut in, his only means of keeping an outlook ahead being through a glass window badly blurred by the falling rain. This window could have been opened so as to have afforded him an unobstructed view ahead. When he finally saw the hack about 25 feet ahead of him, the only effort he made to avoid a collision was by applying the brakes. When he applied them the car began to "skid." Observing then that his brakes were not having the desired effect, we think it was plainly his duty to have used his steering lever and turned out so as to avoid the collision. That the mechanism of his car was all in working order, and that there was ample room to have passed the hack on either side, is admitted. The driver says he was helpless. That, under the evidence, is an unwarranted conclusion. If he had testified that, when he found his brakes were not going to prevent a collision, he tried to turn out, but was unable to do so, that claim might have been made with some show of reason. We do not think it is a sufficient exercise of diligence by the driver of an automobile, when he sees he is about to collide with a vehicle of any kind, to use one of the methods at hand for avoiding a collision, and, when he sees that is not going to have the desired effect, sit, either helpless or careless, and fail to use other means at hand. It is charged that he was driving his car at a high rate of speed; and we think the evidence would justify the jury in so finding. If he was not driving much faster

than seven miles an hour, and the hack ahead of him was also traveling at from six to seven miles an hour, it is incredible that the car could strike the hack with such force as to cause Mrs. Rosewater, in her room some distance away, to arouse her husband, Doctor Rosewater, and say to him, "There must have been somebody hurt; there was a crash in front of the house," and advise that he get up and go out. Moreover, the street could not have been very dark. It is undisputed that an arc light was burning at the street intersection a block away, and one light at Thirty-fifth street, which point they were nearing at the time of the collision. Without pursuing the matter further, we think it would be an invasion of the province of the jury to hold that a verdict should have been directed for defendant, in the face of this evidence. The trial court very properly declined to be a party to such invasion, and its action meets with our approval.

Objection is made to the rulings of the court upon objections interposed by defendant to certain questions propounded to Doctor Rosewater and Doctor Mick. These objections were not entirely without merit, as the particular questions objected to and the answers thereto were somewhat speculative, and therefore obnoxious to the rule announced in *Carlile v. Bentley*, 81 Neb. 715; but a careful examination of the testimony of all of the physicians, testifying on both sides, satisfies us that these rulings of the trial court could not have prejudiced defendant.

It is strenuously urged that the recovery is excessive. The jury returned a verdict for \$4,950. Upon consideration of the motion for a new trial, the district court ruled that a new trial would be granted unless plaintiff remitted \$950 from the verdict. Such a remittitur was then filed and judgment was entered for \$4,000. We have carefully examined the evidence upon this branch of the case and are of the opinion that the verdict is still too large. A careful consideration of this question has impressed us with the conviction that \$3,000 will fully compensate plaintiff for his injury shown by the proofs.

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Upon consideration of the whole case, we think the defendant had a fair trial; that no prejudicial error is shown by the record, and that the evidence is sufficient to sustain a judgment for \$3,000, but that as to the excess above that sum the judgment is excessive. The judgment of the district court is therefore reversed and the cause remanded for further proceedings, unless plaintiff within 30 days from the filing of this opinion shall file a further remittitur for \$1,000, in which event the judgment of the district court will stand affirmed.

AFFIRMED.

SEDGWICK, J., dissents.

BARNES, J., dissenting.

I am unable to concur in the conclusion announced by the majority of my associates. The grounds alleged in plaintiff's petition on which a recovery was sought were, in substance, that the defendant, acting through one of its agents and employees, carelessly and negligently ran its automobile with great force and at an excessive rate of speed against a hack which the plaintiff was driving upon one of the streets of the city of Omaha, and thus caused the injuries of which he complained. Defendant's answer was a general denial, followed by a plea of contributory negligence.

To maintain his action the plaintiff testified, in substance, as follows: My name is David A. Russell. I am the plaintiff, and have resided in Omaha for over 25 years. I am going on 48 years of age. For a good many years I have been a hack-driver. On October 9, I was in the employ of Louis Boone, driving a hack on West Farnam street, in the neighborhood of Thirty-fifth street. It was a one-horse vehicle. It was the night of the Ak-Sar-Ben ball. I conveyed Mr. Black to the ball in the evening, about 8 o'clock; took him home between 12 and 1 o'clock. At the time of the accident I was going east. After leaving Mr. Black at his home, as I came east it was raining, although not a very bad night, just an ordinary rain. It

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would have been dark if there were not lights on the street. It was light where the accident took place. There were lights along there. I could see a block or more ahead of me at the time. I sat on the outside of the hack, and the seat was about five feet from the ground. The seat was high up and inclined toward the front. It was called a jockey seat. In sitting, the body is out in front and you are braced. At the time of the accident I was driving about six or seven miles an hour, jogging along at a very slow rate. I was braced in my seat at the time, not expecting anything. As I was approaching Thirty-fifth street on the south side of Farnam something struck me. I was riding along, not thinking of anything, and something struck me. I felt the crash and something going. I could not tell what happened. I could not tell whether the hack fell over or what happened. I did not know anything for quite a while. When I recovered consciousness I was in Doctor Rosewater's residence across the street. (Then followed a description of plaintiff's injuries and sufferings.)

On cross-examination the plaintiff testified, in substance, as follows: I have been driving hacks for about 33 years; was raised on a farm; worked at times at landscape gardening, where I used a spade and shovel. During the last summer I drove a light wagon for the Expressmen Delivery Company; handled some trunks and small boxes; most of the time I was alone. I worked for the company not quite four months. The wagon had a high seat, and I would have to climb up there. The night of the accident I was alone. All that I know of my own knowledge is that something struck my hack. What it was I do not know, except as I learned from others. I did not see the thing that struck me either before or after the accident. On his redirect examination the plaintiff testified: The blow against my hack was a heavy one. On recross-examination he said: I did not notice the condition of my horse at the moment of the accident. I was knocked clean off, could not see anything.

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The plaintiff also produced Doctor Charles Rosewater as a witness, who testified that he was a physician and surgeon; had been practicing his profession for 30 years; was a graduate of the University of Heidelberg, Germany. He said, I know the plaintiff; met him at my house at the corner of Thirty-fifth and Farnam streets on the 9th of October; when I first saw him he was on the street just being helped up by two parties. This is the way I came to go out: I had just retired; was dozing; my wife aroused me, and said, there must have been somebody hurt; there was a crash in front of the house; and I had better get up and go out. I got up, dressed quickly, went out and found Mr. Russell being assisted to his feet. My wife was in her room at the time she heard the crash.

The foregoing is the substance of all of the evidence produced by the plaintiff in any way bearing upon the accident, or the manner in which it occurred. At the close of the plaintiff's testimony the defendant requested the trial court to direct the jury to return a verdict in its favor. The motion was overruled, and an exception was noted.

As I view the record, it is quite probable that the defendant's motion should have been sustained, for it would seem that the plaintiff failed to establish any negligence on the part of the defendant which could be considered the proximate cause of the plaintiff's injury. The mere fact that there was a collision and an injury would hardly be sufficient proof of negligence to support a verdict for the plaintiff. It appears, however, that the defendant was not content to stand upon the motion, and after it was overruled introduced evidence to support the issues on its part, and to that end produced as a witness one George Hartleib, who testified, in substance, as follows:

I live in Council Bluffs; work in an automobile shop at Griswold, Iowa. In October, 1909, was employed by the Electric Garage Company; had been working for the company about three months at that time. My work was to deliver automobiles and bring them in. I would wait

at the garage until people who owned the electrics called up, and I would go to the house and bring the electric back. I operated it on the way back. I had been running an automobile for about three months prior to October 9, 1909. During the time I worked for the garage company I learned to operate automobiles. It took me three nights to learn. I knew of the T. L. Davis car. It was a Baker Electric. I had operated it about two or three months before the accident. When it was brought to the garage it was for purpose of charging it. Yes; I got word to bring the car in on October 9. I went out for it to Jackson and Thirty-seventh streets, Mr. Davis' residence. Jackson is three blocks south of Farnam. I got the car and started with it to the garage about a quarter of twelve. When I started with it there were two lights in front, burning. The car was a coupe, entirely inclosed with the top closed in and the sides. The top covered the entire framework of the car, except the wheels. I got inside of the car, closed the door and operated it from the inside; went north on Thirty-seventh street to Farnam, then east on Farnam. It was very dark and rainy. From the inside of the car and from the glass in front, covered with water, I could not see more than about 25 feet ahead of me. As I went east on Farnam street I was moving at about seven miles an hour. I had no means of knowing how fast I was going, but was able to estimate. The car was operated in this wise: There were two foot brakes and the controller; move the controller forward and the car would start; to stop the car you would throw the controller back in neutral, and apply your brakes. There were two foot brakes. There is a steering rod and handle which is different from the controller. By moving the rod forward the car moves one way, and by drawing it back the car moves the other way. The different means of operating the car were in working order on the night of the accident, and the car responded to the different means. I did not increase my speed as I went east. My machine was coasting, no power on. The

controller was on neutral. It was a very slight down grade; the means of stopping the car with the controller, as I had to, was by pushing on the brakes. I did not see the hack until I was about 25 feet from it. I could not tell what it was—just a dark object. I could tell the size of it, but could not tell whether it was moving. The hack was close to the car track on the south side. I was traveling along the south side near the car tracks, practically behind the hack. As soon as I discovered the dark object I put on the brakes and the car started skidding. The car started to turn south. I was helpless, and could do nothing. The car kept on moving; before it struck the hack it turned about one-fourth of the way around. It then struck the hack. The front end of the car struck it. I had the brakes on and was trying to stop the car. When the car struck the hack it stopped. Nothing happened to the hack; it seemed to stop. I put my reverse on and backed out to the curb, got out just in time to see the hack upset. As I stepped out of the car the hack overturned. I think it turned towards the north. When I got out I found the hack turned over, the horse down on his haunches. I saw the head and shoulders of the driver; he was between the horse and the hack. I took hold of the driver and pulled him out from under the hack, took him to the sidewalk, and put him in the care of a gentleman who happened to pass by there. I went out to unharness the horse and tie him to a telephone pole. In the meantime Doctor Rosewater came out and helped the driver to his office, with the assistance of the motorman. After the hack was picked up and the horse tied, we dragged the hack to the side of the street. After attending to the injured man in the Doctor's house, I left and drove my car back to the garage. I found a slight dent in the front hood of my car. I am not now in the employ of the garage company. I was not able to stop the car after I saw the hack in front of me. I saw no lights on the hack.

On cross-examination the witness further testified, in

substance: I am 20 years of age; was 18 at the time of the accident. I learned to operate the car in three nights. I did not look for any lights on the hack. The hack, when I first saw it, was running close to the south rail of the street-car track. There was ample room between the hack and the curb for me to pass. There was ample room on the north side of the hack to pass. Yes; I said that I could not see more than 25 feet ahead of the car through a glass covered with rain. I sat there in the car looking through the glass covered with rain, running down Farnam street. I do not know what horse-power my car was. (It is shown by the record, however, that it was $3\frac{1}{2}$ horse-power electric car.)

One George Redick testified for the defendant, in substance, as follows: I am president of the garage company. Mr. Barkalow is manager. I passed Thirty-fifth and Farnam streets soon after the accident. I was riding in an open automobile. The night was very dark, and I did not see the hack as I went by. I was acquainted with the location of the street lights. At the time of the accident there was one side-light on the southeast corner of Thirty-sixth and Farnam; that is two blocks from Doctor Rosewater's house. There was one light at Thirty-fifth and Farnam, another side-light on the south side of the street at Thirty-second. The nearest arc light to Thirty-fifth is at Thirty-fourth street. The pavement was very slippery; they had been hauling dirt on the street, and the rain on the street made the street slippery. I afterwards went to the scene of the accident.

Denise Barkalow, while on the witness stand for the defendant, describes skidding as follows: By skidding I mean that under certain conditions, due to the momentum of the car and the weight, and the fact that the rear wheels will give less resistance, the car has a tendency to slide. It might turn several times. A car will skid even when the ground is not slippery, if it is going at a very great rate of speed and you apply the brakes instantly. Applying the brakes makes the possibility of skidding

much greater. A car never skids when going at a moderate rate of speed, unless the brakes are applied.

It further appears from the testimony that the car which struck the hack was a Baker Electric. The front was glass, which could be lowered about a foot, and the glass on the side doors could be dropped down within about six inches of the level of the wood or framework. If the windows were dropped down it would leave an open space about a foot and a half; the glass in front could be dropped not quite a foot.

The foregoing is the substance of all of the evidence relating to the manner in which the accident in question occurred. At the close of all of the evidence the defendant again requested the trial court to direct the jury to return a verdict in its favor, for the reason that the plaintiff had failed to show any negligence on its part which caused the accident and the resulting injuries to the plaintiff. The motion was overruled, and an exception was taken.

The majority opinion states, in substance, that the driver of the electric car, by operating it when within its glass-inclosed top, where, owing to the darkness of the night and the rain upon the glass in front of him, he was unable to see more than 25 feet, was guilty of actionable negligence. I am not impressed with the soundness of this statement. It appears that the automobile in question was what is known as a "Baker Electric," 3½ horsepower Runabout; the kind of car ordinarily used by women and children, not capable of being run at a dangerous rate of speed, and its operation is not attended by much, if any, danger to any one. It can ordinarily be brought to a full stop within the distance of three or four feet. Cars of this kind are constructed so that they can only be operated while the driver is within the glass-inclosed top. They are in general use in cities, and are as much entitled to the use of the streets as any other vehicle commonly used as a means of travel. The driver

of such a car should not be required to open the windows of his cab, so as to admit rain or snow to drift in, and thus expose the occupants to the elements. By so doing, the very purpose of the inclosed construction of the car would be rendered useless. The driver of such a car has the right to use it in the ordinary manner, and may presume that if he can distinguish an object at the distance of 25 feet he will be able to stop and avoid an impending collision.

It further appears that the driver started to take his car to the defendant's garage at a time when travel on the streets of Omaha was over and practically abandoned for the night, and it should not be presumed that it was negligence for him to attempt to operate the car in the usual manner. He had no knowledge of the slippery condition of the pavement at the place where the accident occurred, and if we regard his testimony, which we must, for it is not disputed by any one, it is entirely clear that when he saw the plaintiff's hack, some 25 feet in advance of him, he applied the brakes, and did everything in his power to stop his car. It is equally clear that he would have succeeded in avoiding the collision if the application of the brakes and the slippery condition of the pavement had not caused the car to skid, and thus deprive him of of all control over its further movements.

It is suggested in the majority opinion that the driver of the car, at the time of the accident, must have been propelling it at an excessive rate of speed. This suggestion is based on the apparent force of the collision and the extent of the injuries to the hack. It appears, however, that where the accident occurred the street was not level, but descended in the same direction in which the vehicles were proceeding. Therefore, when the car skidded, as described by the witnesses, owing to its great weight and the loss of all control over its movements, it would naturally increase its speed until colliding with some object which would serve to stop its further progress.

This would sufficiently account for the force of the collision in a manner entirely consistent with the evidence of the driver that he was, up to the time his car commenced to skid, traveling at a moderate rate of speed.

From a careful review of the evidence, I am of opinion that the accident was one of those which could not have been avoided by the exercise of ordinary forethought and prudence, and the defendant's motion for a directed verdict should have been sustained.

Finally, it seems clear to me that the judgment of the district court is so grossly excessive as to require its reversal at our hands. It appears from the record that the defendant paid all of the expenses incurred by the plaintiff in order to recover from the injuries which he sustained; that in a short time plaintiff was able to, and did, obtain employment as the driver of an express wagon; that he followed that occupation for about 4 months, and then resumed his old occupation as a hack-driver. It was not shown that, after the time of his recovery to the day of trial, he had been compelled to lose a day's employment, or that he suffered any decrease of wages by reason of his injuries. It therefore follows that the amount of the judgment is so excessive that in justice and equity it ought not to be allowed to stand.

For the foregoing reasons, I am of opinion that the judgment of the district court should be reversed.

HENRY J. LEE, APPELLEE, v. GILLEN & BONEY ET AL.,
APPELLANTS.

FILED JANUARY 24, 1912. No. 16,579.

Fraudulent Conveyances: "BULK SALES LAW," PROPERTY SUBJECT TO. Section 6048, Ann. St. 1909, commonly called the "Bulk Sales Law," relates only to merchandise kept for sale "in the ordinary course of trade and in the regular and usual prosecution of"

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business, and does not apply to fixtures or a manufacturer's stock of raw materials used by himself, and not kept or offered for sale in the ordinary course of trade.

APPEAL from the district court for Dodge county:
GEORGE H. THOMAS, JUDGE. *Affirmed.*

C. E. Abbott, for appellants.

Courtright & Sidner, contra.

SEDGWICK, J.

One Kost Teckos was conducting a confectionery and fruit store in Fremont, and manufactured and sold ice cream and confections, and sold drinks from his soda fountain. He was indebted to this plaintiff, and executed a chattel mortgage in which the property mortgaged was described as follows: "One electric motor bought of J. P. Brown, all of the shafting, belting and appurtenances in connection therewith; one ice cream machine, new; * * * sixty freezer cans, new; * * * three kettles, new; * * * five dozen pans for candies; * * * all of the stock of sugars in sacks, chocolate in bars, preserves and stock of supplies in and about my store on Sixth street in Fremont, Neb.; one candy stove, new." He continued the business and the mortgage was not filed, but some time later the mortgagee took possession of the mortgaged property. The defendants contend that the evidence does not sufficiently show that the plaintiff took possession under his mortgage before the levy of the attachment, but we think that the evidence clearly shows that he did. Afterwards, on the same day, the defendants attached a part of the mortgaged property as the property of Teckos and caused the same to be sold to satisfy their claim. The plaintiff brought this action for a conversion of the mortgaged property, and afterwards such proceedings were had that the plaintiff recovered a judgment in the district court for Dodge county; the amount now in controversy is \$90.40 and costs. The defendants have appealed.

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Several minor questions are presented and discussed in the briefs, but the case is not of sufficient importance to require us to discuss them here in detail, since we do not find that any substantial errors occurred requiring a reversal of the judgment.

The principal defense was that the chattel mortgage was void because in violation of section 6048, Ann. St. 1909, commonly known as the "Bulk Sales Law." That section provides: "The sale, trade or other disposition in bulk of any part or the whole of a stock of merchandise, otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business, shall be void as against the creditors of the seller," unless certain conditions are complied with. It will be seen that this statute relates only to "a stock of merchandise," and does not apply to fixtures or a manufacturer's stock of raw material. The supreme court of Massachusetts has so construed a statute similarly worded, and we are satisfied that the construction is correct. *Gallus v. Elmer*, 193 Mass. 106. The question whether giving a chattel mortgage on a stock of merchandise is a disposition of the property within the meaning of the section is presented in the briefs and somewhat discussed; but, as this mortgage did not cover the articles of merchandise that were kept for sale, this important and perhaps difficult question is not involved.

The judgment of the district court is

AFFIRMED.

EDWARD SHANK, APPELLEE, v. C. H. LEE ET AL.,
APPELLANTS.

FILED JANUARY 24, 1912. No. 17,324.

1. Intoxicating Liquors: LICENSE: PETITION: FREEHOLDER. A resident of the village in which the application for saloon license is made, who purchased and paid for property in the village, which

Shank v. Lee.

he has occupied as a home for three years prior to the application, is a freeholder, although he received no deed of the property until the time, or shortly before, he signed the petition.

2. ———: ———: CHARACTER OF APPLICANT: EVIDENCE. If several witnesses testify in a general way that the applicant is a man of good moral character, and there is no evidence to the contrary, the finding upon that point in favor of the applicant based upon such evidence will not be reversed upon appeal.
3. ———: ———: VIOLATION OF STATUTE: EVIDENCE. Evidence examined, and found insufficient to show that the applicant had violated the statute regulating the sale of intoxicating liquors within the year prior to his application for license.

APPEAL from the district court for Merrick county:
CONRAD HOLLENBECK, JUDGE. *Affirmed.*

Martin & Bockes, for appellants.

D. F. Davis, Mills, Mills & Beebe and Reeder & Lightner, contra.

SEDGWICK, J.

Edward Shank applied to the trustees of the village of Silver Creek, in Merrick county, for a saloon license. A remonstrance was filed, and upon hearing the board granted the license. Upon appeal to the district court the action of the village board was affirmed, and the remonstrators have appealed to this court.

The abstract does not show, so far as we have noticed, the number of signers upon the applicant's petition, but it states that the remonstrance alleged that H. N. Wilson, Percy Reed, B. B. Bond, and Lewis Cotton, signers upon the petition, "each was not a *bona fide* resident freeholder of the village of Silver Creek, but had been wrongfully and fraudulently made to appear as a freeholder for the purpose of signing the petition of the applicant"; and the remonstrance also alleged that the applicant had violated the provision of the Slocumb law within the past year, and denied that the applicant was a man of respectable standing and character. The abstract also shows that the re-

monstrators admitted upon the hearing that Percy Reed, B. B. Bond and Lewis Cotton were qualified as signers of the petition. This would leave only one signer, H. N. Wilson, in question. The evidence upon the qualifications of Mr. Wilson, as stated in the abstract, is that Mr. Bell was examined as a witness and identified a deed from himself and wife to Mr. Wilson; that Wilson bought the property of the witness about three years before, but for some special reason took the title in Mr. Bell's name; that Wilson paid the consideration for the property, and had paid the taxes and insurance thereon, and was "now living in the property", and that the witness has no interest in the title to the property. Upon this evidence Wilson was clearly a qualified petitioner. The abstract is quite unsatisfactory and does not comply with the rules; it contains an index of the record, but the abstract itself is not indexed, as required by rule 16 (89 Neb. vii).

The remonstrants contend in their brief that other petitioners were also disqualified. We have examined the evidence contained in the abstract as to the qualifications of the other petitioners, and cannot find from that evidence that the findings of the village board and the district court are not sufficiently sustained by the evidence.

The applicant was called as a witness by the remonstrants, and testified that for some three years prior to his application he had been engaged in conducting a livery stable and a restaurant at Osceola, and that while in the restaurant business he had a government revenue license and sold some malt beer; that he quit the restaurant business July 1, 1910, and had not sold malt beer within the year last past. The statute provides that, if the applicant has violated the provision of the liquor law within the year last past, the village board shall refuse the license. There is no evidence, as shown by the abstract, that this applicant had violated the law within the year prior to his application, and that allegation of the remonstrants was not sustained by the evidence.

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Several witnesses, as shown by the abstract, testified that they were well acquainted with the applicant, and that he was a man of good character and standing in the community where he had lived for several years last past. There was no other evidence on that point.

Upon this evidence, we think that the action of the village board is not so clearly wrong as to require a reversal, and the judgment of the district court is

AFFIRMED.

MARY ANN MAUZY ET AL., APPELLANTS, v. CLAUS HIN-
RICHES ET AL., APPELLEES.

FILED FEBRUARY 10, 1912. No. 16,389.

OPINION on motion for rehearing of case reported in 89 Neb. 280. *Rehearing denied.*

PER CURIAM.

The facts in this case are quite fully set forth in the opinion, 89 Neb. 280. Upon further consideration, that portion of the opinion which may seem in anywise to be in conflict with the doctrine in the cases of *Hovorka v. Havlik*, 68 Neb. 14, and *Cutler v. Meeker*, 71 Neb. 732, that where a state deed to school lands has been mistakenly issued by the state authorities to a person other than the proper owner of the certificate of purchase, the grantee in such a deed takes the legal title to the same as trustee for the true owner and the title inures to him, must be modified. It was not our intention in any manner to change the rules of law laid down in the opinions in those cases. After a renewed consideration of all the facts, we are all of opinion that there is no equity in the plaintiff's bill.

The former judgment is adhered to, and the motion for rehearing is

DENIED.

NATHAN RAY FORSHA, APPELLEE, v. NEBRASKA MOLINE
PLOW COMPANY, APPELLANT.

FILED FEBRUARY 10, 1912. No. 16,411.

OPINION on motion for rehearing of case reported in
89 Neb. 770. *Rehearing denied.*

PER CURIAM.

Upon consideration of the motion for a rehearing, and in view of the rule announced in *Chicago, St. P., M. & O. R. Co. v. McManigal*, 73 Neb. 585, we are of opinion that no judgment should have been rendered on the verdict in this case.

It is therefore considered that the judgment against the plaintiff and in favor of defendant Murdock & Son, and the judgment in favor of the plaintiff and against the Nebraska Moline Plow Company, should be reversed and the cause remanded to the district court for a new trial, with leave to the plaintiff to proceed against both of the defendants.

The motion for a rehearing is

OVERRULED.

HERMAN B. PRICE, APPELLEE, v. GEORGE R. FOUKE,
APPELLANT.

FILED FEBRUARY 10, 1912. No. 16,592.

APPEAL from the district court for Lancaster county:
LINCOLN FROST, JUDGE. *Affirmed.*

G. W. Berge, for appellant.

Claude S. Wilson, contra.

PER CURIAM.

Plaintiff commenced this action in justice court. A jury trial was had on the 14th day of September, 1909, which resulted in a verdict and judgment in favor of plaintiff. On the 24th day of September, defendant filed his appeal bond, and on the 16th day of the following October the transcript on appeal was filed in the district court, which was 32 days after the rendition of the judgment. The statute (code, sec. 1008) requires the appeal to be taken within 30 days next following the rendition of the judgment. Plaintiff filed his motion to dismiss the appeal, for the reason that it was not filed within the 30 days prescribed by the statute. The motion to dismiss was resisted on the ground that the transcript had been duly demanded by defendant, that it had not been furnished until after the expiration of the 30 days, and that the failure to procure it was chargeable to the justice of the peace and through no fault or want of diligence on the part of defendant or his attorney. Affidavits were filed in support of, and opposition to, the motion. Application was later made for an order requiring the witnesses to appear in court for oral examination. The order was made, and the witnesses appeared and gave their testimony in open court. The motion to dismiss the appeal was sustained and the appeal dismissed. Defendant appeals.

It is shown in the bill of exceptions that the transcript was called for on several occasions during the 30 days, and was completed and ready for delivery on the 12th day of October, two days before the expiration of the time within which it might be filed in the district court. The evidence was conflicting in many respects, but particularly as to whether the transcript was demanded or called for after its completion. Upon this question there was a sharp and direct conflict. If defendant's attorney is not mistaken, he asked for the transcript on the 14th day of October, the last of the 30 days allowed for filing.

Oleson v. Oleson.

If the justice of the peace is not mistaken, his attention was not called to the matter nor the transcript called for at any time after it had been prepared. Both parties testified candidly, no doubt, but the conflict remains. The witnesses were all before the court, and we cannot reverse the decision on the weight of the evidence. A finding by the trial court upon conflicting evidence, in a law action, will not be disturbed on appeal unless manifestly wrong.

The judgment dismissing the appeal is therefore

AFFIRMED.

134-643

OLEY OLESON, APPELLANT, v. ULYSSES OLESON ET AL.,
APPELLEES.

FILED FEBRUARY 10, 1912. No. 16,610.

1. Statute of Frauds: ORIGINAL UNDERTAKING. An agreement that, in consideration of the relinquishment of the possession of property held under a pledge, the person to whom the surrender of possession is made will pay the debt of the relinquisher, for the security of which the pledge is held, is not void under the statute of frauds. It is an original undertaking founded upon a new consideration.
2. Trial: QUESTIONS FOR JURY. All material questions of fact are for the consideration of the trier of fact; if in a trial by jury, the jury must determine them.
3. —: DIRECTING VERDICT. A trial court is not justified in withdrawing a case from a jury and directing a verdict, if there is competent evidence from which the alleged facts may be reasonably inferred.

APPEAL from the district court for Madison county:
ANSON A. WELCH, JUDGE. *Reversed.*

Allen & Dowling, for appellant.

Mapes & Hazen, contra.

REESE, C. J.

Plaintiff filed his petition in the district court alleging, in substance, that, prior to the date of the transactions between himself and defendants, his son Ulysses Oleson purchased from the Northwest Thresher Company a certain threshing machine and outfit, consisting of a threshing machine or separator, one 16-horse power traction engine with tender, a wind stacker and a steel tank; that plaintiff became surety upon the notes executed for the purchase price thereof, and that defendant Ulysses Oleson pledged and delivered to the plaintiff the possession of said threshing outfit, to be held by him as security to indemnify him against having to pay the notes referred to; that, while the said machinery was in his possession, the said defendants Ulysses Oleson and Ellsworth A. Bullock entered into an agreement whereby the said Ulysses was to exchange the said "Northwest" machinery to defendant Bullock for a new, larger and more expensive threshing outfit, which Bullock had for sale, he being engaged in the business of selling such machinery; that, while the said "Northwest" outfit was in the possession of plaintiff, the defendants Bullock and Ulysses Oleson came to plaintiff's home for the purpose of removing the "Northwest" machinery, but that plaintiff refused to surrender the same until he was released from liability on the notes (then amounting to \$1,740) given for that outfit; that defendants Ulysses Oleson and Bullock agreed that, if plaintiff would release his lien and possession of said "Northwest" outfit, they would indemnify him against the payment of the notes, which he had given, and pay the same; that, relying on said agreement and promise, he relinquished his lien and surrendered the property, which was then removed to the place of business of defendant Bullock, retained and sold by him, and defendant Bullock thereafter exchanged the thresher he had for sale to the said Ulysses; that defendants did not comply with their promise and agreement, but failed

and refused to take up the notes, and plaintiff was required to pay them, whereby he had been damaged to the extent of the money paid, with interest thereon, amounting to the sum of \$2,088, for which he asked judgment. Defendant Ulysses Oleson made default, and, failing to plead to the petition, default and judgment were entered against him. Defendant Bullock answered, denying each and every allegation of the petition. A jury was impaneled, and the trial proceeded until the close of plaintiff's evidence, when defendant Bullock moved the court to instruct the jury to return a verdict in his favor. The motion was sustained, the jury so instructed, a verdict returned as directed, and on which judgment was rendered. Plaintiff appeals.

The motion for a peremptory instruction was based upon six grounds: (1) The petition does not state facts sufficient to constitute a cause of action. (2) The evidence fails to establish a lien or pledge of the property claimed to have been taken by defendant, or that the property was in possession or control of plaintiff at the time it was delivered to defendant. (3) That the contract alleged to have been made by defendant is void under the statute of frauds. (4, 5) The evidence failed to show any authority on the part of Clyde Bullock to make the alleged agreement on behalf of defendant. (6) The evidence is not sufficient to sustain a verdict in favor of plaintiff.

As to the first clause or ground of the motion, the substance of the petition is herein above set out, and we all agree that the objection is not well taken. The contention of defendant Bullock is that, if the contract was made as alleged, it was void under the statute of frauds. If the contract was entered into, it was founded upon a new consideration, was an original undertaking, and not void as an obligation to answer for the debt or default of another. It was not that defendant Bullock would pay the debt of Ulysses, but that, in consideration of the surrender of the property by plaintiff, he would pay and in-

demnify plaintiff against a debt which the latter owed and was obligated to pay.

The sole remaining question is as to the sufficiency of the evidence to require the submission of the case to the jury. As to the fact that such a contract was made between plaintiff and Clyde Bullock, the son of defendant Bullock, there is no conflict in the evidence. Plaintiff testified unequivocally that such a contract was made. Defendant offered no testimony. If the property had been delivered to plaintiff by Ulysses as a pledge or security against the payment of the debt by plaintiff, and plaintiff was in possession of the same at the time the alleged contract was made, this would establish the pledge and security. If there was any competent evidence of the fact, it became a question for the decision of the jury. It is not for this court to decide whether there is convincing evidence of the fact, but whether there was any competent evidence submitted tending to prove the facts alleged. Upon this question the testimony of plaintiff is not entirely harmonious. He seems not at all times to have fully understood the purport of the questions propounded. In one of his answers he says: "I was to have possession of the machine until it was paid for, and he (Ulysses) could run it, and when he paid for it I would give up all these notes." That there was some kind of an agreement between Ulysses and plaintiff was probably sufficiently established, but just what it was may not be so clear. The fact of plaintiff's possession, at the time the contract with Clyde Bullock is alleged to have been made, seems to have been then conceded by both Clyde and Ulysses Oleson. If plaintiff had possession under an agreement of the kind alleged, that would be sufficient. As the record now stands, there was sufficient evidence that the contract of indemnity and the assumption of the debt were made. Clyde Bullock was called as a witness by plaintiff, and was examined at some length, and cross-examined by defendant, but he was not interrogated by either party upon the subject of that agreement. It is

shown by the evidence that defendant Bullock sold a "Gaar-Scott" machine to Ulysses, and agreed to accept the "Northwest" machine in exchange and as part payment for the new one, and therefore the delivery to him of the "Northwest" outfit was necessary in order to the completion of the sale.

This brings us to the question of the authority of Clyde Bullock to bind defendant Bullock by the contract of indemnity, which, for the purpose of this appeal, we must assume was made. The evidence is clear that Clyde was the agent, as a salesman, for his father in the sale of threshing machines. He participated, at least, in making the contract by which the new machine was sold to Ulysses and in which the old one was to be taken in exchange. The arrangement for exchange was agreed to by defendant. As testified to by defendant when called as a witness by plaintiff, his business was buying and selling threshing machines and supplies, and repairing and rebuilding old machines. It is apparent that his son, Clyde, had general authority as a salesman. The contract for the sale of the new machine was entered into March 9, 1907, the order taken by "Clyde J. Bullock, Salesman." When the time came for the exchange, Clyde was sent to the home of plaintiff to obtain the old machine and give his aid in transporting it to the railroad station, in order that it might be shipped to defendant at Norfolk. When he arrived at plaintiff's home, he was informed of plaintiff's possession and what was insisted upon as plaintiff's rights, coupled with a refusal to allow the machine to be removed until he was relieved of all liability on the notes and contract which he had signed. The surrender and relinquishment of that possession was essential to the completion of the sale of the new machine to Ulysses. As the evidence now stands, Clyde, evidently intending to represent his father, entered into the agreement that the unpaid notes, representing a part of the purchase price of the old machine, should be taken up and plaintiff's liability thereon terminated. The machine was shipped to defendant, re-

ceived by him, sold (in part at least), the notes were not taken up, and plaintiff paid them. The agency of Clyde is sufficiently shown to have existed in all matters connected with this sale and exchange, and in all matters relating to the sales of machinery, except the single one of his undertaking to protect plaintiff as against the notes referred to, and it is claimed that in that instance he was sent only to assist in the removal of the machine to the station. We do not find in the evidence any suggestion that he gave plaintiff any notice of such a special limitation upon his authority or powers. This evidence was sufficient to have justified the submission to the jury of the questions of the contract of pledge, the possession of plaintiff thereunder, and of the agency of Clyde in making the contract of indemnity.

The measure of plaintiff's damages, in case he is finally successful, is but slightly referred to in the briefs. The theory of the suit by plaintiff is that he should recover all he was required to pay in satisfaction of the notes, with interest thereon. The defendant makes no contention on the measure of damages, but denies all liability. If the contract binding defendant is finally established, it becomes an important question as to whether plaintiff is entitled to recover the full amount paid by him and for which he held a lien on the machine, or whether he should recover only the value of the property which he released. So far as now appears from the evidence, the value of the machine did not equal the amount for which he was held upon the notes. The pleadings might support a judgment for either amount, and it is the opinion of this court, in case of plaintiff's recovery, that he should receive at least the equal of what he has lost by the surrender of the property, which would be its value at the time he relinquished his right.

The judgment of the district court is reversed and the cause is remanded to that court for further proceedings.

REVERSED.

WILLIAM ROCKWELL V. STATE OF NEBRASKA.

FILED FEBRUARY 10, 1912. No. 17,398.

Larceny: SUFFICIENCY OF EVIDENCE. Evidence examined, its substance stated in the opinion, and held to be insufficient to sustain the verdict.

ERROR to the district court for Richardson county:
JOHN B. RAPER, JUDGE. *Reversed.*

R. C. James and C. Gillespie, for plaintiff in error.

Grant G. Martin, Attorney General, and Frank E. Edgerton, contra.

BARNES, J.

The plaintiff in error, hereinafter called the defendant, was charged in the district court for Richardson county with the crime of larceny from the person, as defined by section 113a of the criminal code. He was convicted and sentenced to serve a term of not less than one nor more than seven years in the state penitentiary, and has brought the case here by a petition in error.

One of his principal assignments of error is that the verdict and judgment are not sustained by the evidence.

The defendant was charged with stealing a pocket-book containing \$45 from the person of one John Mosiman on the 11th day of August, 1911, which was the day that Ringling Brothers' circus showed in Falls City. It appears that Mosiman, who was an old and confiding German, was upon the street that day, and had his purse in his pocket; that he stopped upon the main street at a place where what was called a "Baby-Rack" was in operation, and he testified, in substance, that he stood there looking at the Baby-Rack; that there were some other persons around there; that the defendant ran against him, and that about the same time he saw another man close to him, whom he did not afterwards see or recognize;

that he put his hand in his pocket, and found that his purse was gone. He thereupon immediately grabbed hold of the defendant, and accused him of stealing his purse, and at the same time made an outcry for help; that the defendant said to him, in substance, "What's the matter, old man?" and then broke away and ran up the street. It appears that several other persons saw the defendant running, and at all times after he broke away from the prosecuting witness he was observed by some one. The defendant was caught within two blocks of the place where it is claimed the robbery occurred, and was immediately searched, but no pocket-book or money, except a little small change amounting to perhaps 50 cents, was found upon his person. Nothing more was seen or heard of the person that Mosiman called "the other man." The prosecuting witness also testified that he was conscious of having his pocket-book in his pocket within from three to five minutes of the time he missed it, and seized hold of the defendant.

The foregoing is the substance of the transaction as described by the prosecuting witness. Several other witnesses testified that they saw the defendant when he broke away from Mosiman and ran up the street. No one saw him drop a purse, or dispose of anything in the way of dropping it or throwing it away. The officers who searched the defendant all testified that nothing was found upon his person which would indicate that he had taken Mosiman's money. It therefore becomes apparent that the defendant could not have committed the offense charged unless he did so with the aid of a confederate. There is no competent testimony in the record that he was seen with any other person who could have assisted him as an accomplice.

The defendant, testifying in his own behalf, stated that he came from Cairo, Illinois, to Falls City, in order to obtain work; that he arrived there on the Burlington train from St. Joseph at about 1:30 o'clock of the morning of the day the robbery was committed; that he knew

no one, and had no knowledge that any other person was with or near him when he was seized by the prosecuting witness; that he had no companion, and the reason he ran, when accused of the theft by the prosecuting witness, was because he was a stranger in the place and did not want to be arrested. He strenuously denied that he had taken Mosiman's money, or that he knew anything about the matter whatever.

The foregoing is the substance of all of the testimony, and the matter is left in such a doubtful state that we are of opinion that the evidence does not establish the defendant's guilt. Having reached the foregoing conclusion, the other assignments of error will not be considered.

For the reason that the evidence is insufficient to sustain the verdict of the jury, the judgment of the district court is reversed and the cause is remanded for further proceedings.

REVERSED.

MYETLE M. HEINKE, ADMINISTRATRIX, APPELLEE, v. HENRY
HELM, APPELLANT.

FILED FEBRUARY 10, 1912. No. 16,595.

1. **Replevin: ESTRAYS: REFUSAL TO ARBITRATE** One who takes up an animal as an estray under the provisions of chapter 27, Comp. St. 1911, cannot prevent the owner from recovering his property by refusing to accept a sum of money sufficient to pay for the expense incurred and the cost of keeping and caring for the animal or to submit his claim therefor to arbitration.
2. ———: ———: ———. In case of such refusal, the owner, after depositing a sum of money in court sufficient to cover the expense and cost of keeping and caring for the animal, may recover his property by an action in replevin.

APPEAL from the district court for Otoe county: JOHN
B. RAPER, JUDGE. *Affirmed.*

A. P. Moran, for appellant.

D. W. Livingston, George H. Heinke and Pitzer & Hayward, contra.

BARNES, J.

Action in replevin to recover the possession of an animal taken up by the defendant as an estray. Upon appeal to the district court for Otoe county, the case by agreement was tried to the court, without the intervention of a jury. There was a finding and judgment for the plaintiff and the defendant has appealed.

It appears that on the 18th day of February, 1908, the defendant took up a heifer belonging to the plaintiff as an estray; that he proceeded in all respects according to the provisions of chapter 27, Comp. St. 1911, entitled "Estrays," up to and including the publication of notice; that when the notice was published, and the plaintiff ascertained where he could find the animal in question, which was during the first part of April, 1908, he saw the defendant, and offered to pay him \$18 to reimburse him for his expenses and the cost of keeping the animal up to that time. This offer was refused, and the defendant in turn demanded the sum of \$25 before he would yield possession to the plaintiff. Thereafter plaintiff brought this action to recover his property, and at the same time deposited with the justice of the peace, before whom the action was commenced, the sum of \$12.50 to pay the defendant for his expenses and the cost of the care for the animal. On the trial the plaintiff had judgment, and the defendant appealed to the district court, where the plaintiff again had the judgment, from which this appeal is prosecuted.

The finding of the district court was, in substance, that the defendant had refused to submit the question of his expenses and cost of keeping and caring for the animal in question to arbitration, and had also refused to accept a

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reasonable sum of money from the plaintiff to satisfy his claim therefor; that, plaintiff having deposited a sufficient sum of money to satisfy such claim in court for the defendant's use, he was entitled to, and could maintain replevin for, the possession of his property.

The record contains sufficient competent evidence to support the judgment, and it is therefore

AFFIRMED.

**WESTERN BRIDGE & CONSTRUCTION COMPANY, APPELLANT,
V. CHEYENNE COUNTY ET AL., APPELLEES.**

FILED FEBRUARY 10, 1912. No. 16,992.

1. **Counties: NEW COUNTIES: CONTRACTS: POWER TO ABBROGATE.** Cheyenne county by taxation created and collected a fund with which to build a bridge across the North Platte river as a part of one of its highways, and to that end entered into a valid written contract with a bridge company. Before the bridge was built the county was divided, and Morrill county was created and organized out of that part of the territory formerly in Cheyenne county in which the bridge was to be constructed. Thereafter Cheyenne county attempted to repudiate the bridge contract. *Held*, That the county board of Cheyenne county could not abrogate the contract without the consent of Morrill county.
2. ———: ———: **CONTRACT FOR BRIDGE: LIABILITY.** In such case the bridge company had the right to construct the bridge, and Cheyenne county was liable to pay the contract price therefor out of the fund which had been created for that purpose, and the bridge company was entitled to a judgment against the county for that amount.
3. ———: ———: **BRIDGE FUND: APPLICATION OF FUND.** It appearing that in the division of property between the counties as provided by section 16, art. I, ch. 18, Comp. St. 1911, Morrill county was entitled to receive one-third of the bridge fund in the treasury of Cheyenne county. *Held*, That Cheyenne county could apply that fund to part payment and satisfaction of the judgment, and that such payment would satisfy the claim of Morrill county for its part of the bridge fund.
4. **Appeal: CONSOLIDATION OF ACTIONS: REVERSIBLE ERROR.** Where two actions are consolidated and submitted to the district court to

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determine all of the rights, duties and equities of all of the parties to both actions, it is the duty of the court to dispose of all of such matters, and a failure to perform that duty may constitute reversible error.

APPEAL from the district court for Cheyenne county:
HANSON M. GRIMES, JUDGE. *Reversed.*

Wilcox & Halligan, Switzler & Goss and Charles O. Whedon, for appellant.

Hoagland & Hoagland, J. L. McIntosh, F. E. Williams, Leroy Martin, W. P. Miles, Joseph M. Swenson and R. W. Devoe, contra.

BARNES, J.

APPEAL from a judgment of the district court for Cheyenne county dismissing the action of the appellant, the Western Bridge and Construction Company.

It appears that the commissioners of Cheyenne county, in response to a petition filed for that purpose, determined to construct a bridge across the North Platte river at or near the town of Irving, in that county; that a bridge tax had been levied and collected, and there was available to the county the sum of \$11,524.43 for that purpose; that on the 12th day of September, 1908, the board published a notice inviting bids for the construction of the bridge, according to certain plans and specifications, which had theretofore been adopted; that at that time there was on file a petition for an election to divide the county. In due time the election was called, and notice thereof was published and given as provided by law; that on the 10th day of October the board opened the bids, and awarded the contract to build the bridge to the plaintiff, hereinafter called the Bridge Company, as the lowest and best bidder, and to that end entered into a written agreement, by the terms of which the plaintiff was required to give a bond to the county in the sum of \$2,000 for the performance of the contract according to its terms; that the Bridge Com-

pany thereafter gave the required bond, which in due time was approved by the county board; that at the election, which was held on the 3d day of the following November, the proposition for county division was adopted, and in due time county officers were elected to take charge of the affairs of the new county. The governor thereupon issued his proclamation, and on the 4th day of January, 1909, the organization of the new county was completed, and part of the territory formerly embraced in Cheyenne county became the new county of Morrill. Thereafter, and on the 11th day of February, 1909, the county board of Cheyenne county caused the clerk of that county to send a letter to the Bridge Company notifying it that the county had repudiated the contract above mentioned, for the reason that after the date of the said contract Cheyenne county was divided and Morrill county was created out of a part of its territory; that the river intended to be bridged was in Morrill county, and indicated its willingness to bear any reasonable expense that the Bridge Company had incurred by reason of the contract.

Cheyenne county thereafter took no further action in the premises, and on the 9th day of March, 1909, the two boards of commissioners made a settlement of all of the property rights, debts, liabilities and obligations of their respective counties, on the basis of one-third to Morrill county and two-thirds to Cheyenne county, with the exception of the matter relating to the bridge contract above mentioned. In that settlement it appears to have been stipulated that, whereas Cheyenne county had entered into a valid contract with the Bridge Company to build the bridge in question, and the county boards were unable to agree as to the respective rights and liabilities of the two counties growing out of said contract, the proposed construction of the said bridge and the division of the bridge fund then in the treasury of Cheyenne county, the matters in difference should be settled by the judgment of the district court for Cheyenne county, and an action was duly brought for that purpose.

It further appears that the Bridge Company built the bridge in all respects in compliance with the terms of its contract, and the bridge thus constructed is wholly within Morrill county; that on the 9th of November, 1909, it filed its claim with the board of county commissioners of Cheyenne county for the sum of \$9,359.29, which was the cost of the construction of the bridge according to the terms of the contract. Thereafter the county board wholly rejected the said claim, and thereupon the Bridge Company appealed to the district court for that county; that there were then two cases pending in said court—one between the Bridge Company and the defendant Cheyenne county, and one between Cheyenne county and Morrill county—growing out of and connected with matters relating to the same transaction. It further appears that, in response to a motion made by Cheyenne county, the two cases were consolidated, and the district court was requested to adjudicate the rights of the parties and determine all of the matters in controversy according to the rights, duties and liabilities of the respective litigants. The record discloses that afterwards, and on the 22d day of August, 1910, that court rendered a judgment in favor of Cheyenne county and against the Bridge Company, dismissing its action, and refusing to grant it any relief in the premises, and directed the county of Cheyenne to pay to Morrill county one-third of the bridge fund in the treasury of Cheyenne county at the time Morrill county was organized. From that judgment the Bridge Company and Morrill county have both appealed.

The contention of the Bridge Company is that the district court erred in finding that Cheyenne county had repudiated the contract in question, and in dismissing its action without granting it any relief in the premises whatsoever. It is also contended by Morrill county that the county board of Cheyenne county had no right or power, after the organization of Morrill county, to take any action which in any manner would destroy the rights acquired by that county growing out of the bridge contract

entered into while it was a part of Cheyenne county. We are of opinion that this contention is well founded. When the contract in question was signed, the commissioners of Cheyenne county acted for all of the territory included therein and the inhabitants of that part of such territory as afterwards became Morrill county. They had paid a part of the taxes which had created the bridge fund then in the county treasury of Cheyenne county, with the understanding that they were to have the benefits which would naturally flow from the construction and use of the bridge in question. When the commissioners of Cheyenne county attempted to repudiate the contract, they had no power or jurisdiction to act for Morrill county or any of its inhabitants. Therefore they could take no action which would affect the rights of that county. It seems clear that Morrill county had a beneficial interest in the contract, and it was beyond the power of the commissioners of another county to repudiate or put an end to it without the consent of that county. *Bremer County v. Walstead*, 130 Ia. 164; *State v. Commissioners of Kiowa County* 41 Kan. 630; *Commissioners of Marion County v. Commissioners of Harvey County*, 26 Kan. 181. These authorities, while not precisely in point, sustain the foregoing proposition. It therefore follows that the attempted repudiation by Cheyenne county was wholly ineffectual, and the Bridge Company had the right to carry out the contract and build the bridge according to its terms. This also carried with it the right to maintain an action against Cheyenne county to recover the cost of the bridge out of the fund which had been raised and was in the treasury of Cheyenne county for that purpose. In view of the situation, it would seem that the district court should have rendered a judgment against Cheyenne county and in favor of the Bridge Company for the amount of its claim, less the amount of the freight bills, which by the terms of the contract, and by leave of the state railway commission, the Union Pacific Railroad Company had agreed to receipt in full as a donation to aid the people of that

county in constructing the bridge, which was considered a necessary work of public improvement, and was, in a way, a benefit to the railroad company.

The district court should also have directed and decreed that Cheyenne county was entitled to and should be required to apply one-third of the bridge fund in its treasury at the time of the organization of Morrill county to the satisfaction of so much of the judgment against it, and that such payment should be a complete satisfaction of Morrill county's claim against Cheyenne county on account of the interest it had in said bridge fund.

It is further contended by Morrill county that the district court erred in failing and refusing to determine all of the rights, duties and liabilities between it and Cheyenne county, and render judgment thereon in accordance with justice and equity. We think this contention is well founded. By the terms of the submission of the two causes for adjudication, it was the duty of the court to determine all of the matters in controversy in the manner above indicated.

For the foregoing reasons, the judgment of the district court is reversed, and the cause is remanded for further proceedings in harmony with the views expressed in this opinion.

REVERSED.

HAMER, J., dissenting.

As I understand the case, the new county was cut off from the old county of Cheyenne before any work had been done on the bridge. This condition gave Cheyenne county the power to rescind the contract because it was executory. It was probably the duty of the board of county commissioners of Cheyenne county to rescind the contract. At least that is what the board attempted to do. I think that the board did what was right. I doubt the authority of the county board to build a bridge in another county than that in which the members of the board reside. I do not think that Cheyenne county should be held

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liable on the contract for the building of the bridge. Whether the tax levied for the building of the bridge should create a specific fund to be applied in satisfaction and payment of the contract price is another question. There should be no future liability declared against Cheyenne county. The Cheyenne county board should not be compelled to build and pay for a bridge in any other county than Cheyenne, and, when the counties were divided and the new county was cut off from Cheyenne, the jurisdiction of the Cheyenne county board ceased.

THOMAS M. LOGAN, APPELLANT, v. REGNAR F. AABEL ET AL., APPELLEES.

FILED FEBRUARY 10, 1912. No. 16,593.

Trusts: CONSTRUCTIVE TRUSTS: RELIEF IN EQUITY. Where one person obtains property of another by theft or fraud, equity will raise a constructive trust in favor of the defrauded party, and he may follow the property into the hands of third persons taking it with knowledge.

APPEAL from the district court for Harlan county:
HARRY S. DUNGAN, JUDGE. *Reversed.*

John Everson, for appellant.

Adams & Adams, contra.

LETTON, J.

The district court sustained demurrers to the petition, and from a judgment of dismissal plaintiff appeals. In substance the petition alleges Regnar M. Aabel and Regnar F. Aabel, Jr., are father and son; that while Aabel, Jr., was employed by plaintiff he was in charge and full control of a stock of merchandise belonging to plaintiff, as manager; that while so employed he fraudulently appropriated to his own use plaintiff's goods and merchandise of about

the value of \$4,500; that he fraudulently appropriated to his own use and benefit money taken in for the sale of merchandise to the amount of about \$3,000, and also wrongfully sold goods and merchandise at a price much less than the true value thereof, contrary to the knowledge and consent of plaintiff, to plaintiff's damage in the sum of \$8,000; that with the moneys so wrongfully obtained he purchased an undivided one-half interest in 160 acres of land in Harlan county, the other half interest standing of record in the name of his father, Regnar M. Aabel; that after plaintiff discovered the peculations the son executed and placed of record a deed to his interest in the land to his father; that the father is now endeavoring to sell and dispose of the land, though knowing the facts, and knowing that the same was purchased by the son with the proceeds of the property wrongfully taken from the plaintiff. It is also alleged that both defendants are wholly insolvent, that the interest of Aabel, Jr., in the land is of the value of about \$1,250, which is all the property of which he is possessed, and that the father is about to sell the land and convert the proceeds to his own use, and will do so unless restrained by an order of the court. The prayer is for judgment against Aabel, Jr., for the value of the property taken; that Aabel, Sr., be charged as a trustee *ex maleficio* to hold the title to the land for the plaintiff's use, and that he be restrained from selling and conveying the land and converting the proceeds.

The petition, while in some respects inartistically drawn, seems sufficient to state a cause of action.

The defendant Aabel, Jr., is charged with having, while in a position of trust and confidence, converted the goods and money of the plaintiff to his own use and invested the proceeds in land, while the other defendant is charged with having full knowledge of the fraudulent origin of the property and with receiving it with the intent to carry out the fraudulent purpose. These facts make the case one with which a court of equity is alone fitted to deal in such a manner as to do justice. There is an allegation that the

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plaintiff sold merchandise for less than it was worth and a general allegation of damages, but these we think must be regarded as surplusage, since it is clear that the purpose of the action is to reach the property into which it is alleged the money of the plaintiff has been converted.

Where one person obtains the property of another by theft or fraud, equity will raise a constructive trust in favor of the defrauded party, and he may follow the property into the hands of third persons taking it with knowledge. *Tecumseh Nat. Bank v. Russell*, 50 Neb. 277; *Nebraska Nat. Bank v. Johnson*, 51 Neb. 546; *Lamb v. Rooney*, 72 Neb. 322. Another court has aptly said: "The true owner of property has the right to have his property restored to him, not as a debt due and owing, but because it is his property wrongfully withheld. As between the *cestuis que trustent* and the trustee and all persons claiming under the trustee, except purchasers for value and without notice, all the property belonging to the trust, however much it may have been changed in its form or its nature or character, and all the fruits of such property, whether in its original or altered state, continues to be subject to and affected by the trust. * * * It was formerly held that these rules came to an end the moment the means of ascertaining the identity of the trust property failed. * * * In the case of trust moneys commingled by the trustee with his own moneys, it was held that money has no earmarks, and when so commingled the whole became an indistinguishable mass and the means of ascertainment failed. But equity, adapting itself to the exigencies of such conditions, finally determined that the whole mass of money with which the trust funds were commingled should be treated as a trust." *Windstanley v. Second Nat. Bank*, 13 Ind. App. 544.

We think the demurrers should have been overruled. The judgment of the district court must, therefore, be reversed and the cause remanded.

REVERSED

IRA V. REASONER ET AL., APPELLERS, v. JOHN W. YATES ET AL., APPELLANTS.

FILED FEBRUARY 10, 1912. No. 16,608.

1. **Brokers: SALE OF LAND: LIABILITY FOR COMMISSIONS.** If a vendor of lands enters into a contract of sale of the same with a competent purchaser produced by a land broker or agent, the subsequent inability of the vendor to convey a good title, by reason of which the contract is not performed, does not release him from the obligation to pay the agent's commission.
2. ———: ———: ———. The fact that the contract is canceled afterwards by mutual consent of the vendor and the vendee cannot affect the right of the agent to recover the agreed compensation for procuring a purchaser, where the vendee has at all times been in such a position that performance could have been enforced.
3. ———: ———: ———: **SUBAGENTS.** So, also, with reference to the liability of a general agent for commission to persons whom he may employ as subagents. In such transactions the original agent stands in the same relation to the subagent as the vendor does to him, and, when the subagent has produced a purchaser with the requisite qualifications, the liability of his principal to pay the agreed commission exists, irrespective of whether the owner of the land refuses to ratify the sale or is unable to make a good and satisfactory title.
4. ———: ———: ———. In an action by an agent against an owner, if the only reason that a sale has not been completed is that the vendor cannot furnish a good and perfect title, it is not essential to recovery that the owner had represented to him that his title is good. Neither is it so in a case of subagency.
5. **Evidence: SECONDARY EVIDENCE: ADMISSIBILITY.** A carbon copy of a letter was properly received in evidence, when it was proved that the original had been duly mailed to the address of defendants at their usual place of business, that notice had been served upon them to produce the original for inspection, that it had not been produced, and that it was stated at the trial that they had made diligent search and were unable to find the same.
6. **Brokers: SALE OF LAND: APPLICABILITY OF STATUTE: SUBAGENTS.** The provisions of section 10856, Ann. St. 1911, providing that contracts for the sale of lands, "between the owner thereof and any broker or agent employed to sell the same, shall be void, unless the contract is in writing," are not applicable to a contract made

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between an agent of the owner employed to sell the lands and a subagent whereby the agent agrees to pay the subagent a specific commission if he procure a purchaser for the land.

7. ———: ———: EVIDENCE. Evidence examined, and held to justify the giving of certain instructions and to sustain the verdict of the jury.

APPEAL from the district court for Jefferson county:
LEANDER M. PEMBERTON, JUDGE. *Affirmed.*

Heasty, Barnes & Rain and McKesson & Turner, for appellants.

C. A. Robbins and E. A. Wunder, contra.

LETTON, J.

This action was brought to recover commissions claimed to have been earned by the plaintiffs as subagents for the defendants in the sale of certain lands situated in Colorado. Plaintiffs were land agents, whose place of business was in Lincoln, Nebraska. Defendants were in the same business in Colorado Springs, Colorado. There are six causes of action set forth in the petition. The first alleges that the plaintiffs by an oral agreement with defendants undertook to procure persons who would purchase certain lands in the San Luis valley through and from the defendants as agents of the owners, and defendants undertook and agreed to pay to plaintiffs 10 per cent. of the purchase price of each piece of the land sold to such purchasers. The plaintiffs advertised the lands extensively, and procured a purchaser ready, willing and able to purchase, whereby the agreed commission became due and payable. The first six causes of action are identical, except as to the name of the purchaser, the date and amount of the sale, and the amount of commission. The seventh cause of action is of like nature, except that it alleges a part payment of the commission and a balance due. The answer is a general denial to the first six causes of action, and a settlement as to the seventh. The settle-

ment is denied by the reply. A verdict was returned for the plaintiffs. The court required a remittitur of a part of the recovery, overruled the motion for a new trial, and rendered judgment.

Defendants first contend that the recovery is excessive for the reason that two of the purchasers failed to complete the purchase on account of the owners of the land failing to furnish satisfactory title thereto, and also in this connection complain of the giving of instructions Nos. 1 and 13, given at request of plaintiffs. These instructions in substance told the jury that the plaintiffs were entitled to their commission after a contract of sale was made and the purchasers were able, ready and willing to comply with the terms of sale. Defendants argue that the evidence shows that "the prospective purchaser was able, ready and willing to buy, provided he should receive a good title, but the good title was not forthcoming so he was not willing to purchase," and, hence, the contract was never fulfilled.

The evidence shows that one of the purchasers to whom the law laid down in these two instructions is applicable was able, ready and willing to carry out the contract from the time it was made in 1907 until the time of the trial in 1909, but was prevented from doing so by the inability of defendants to convey a good title, and that the other purchaser had also been ready to fulfil until the contract was finally canceled by his consent and that of the defendants for the same reason. It is also shown that the plaintiffs had no hand in this cancelation, and did not waive their right to a commission on the sale. It is settled law in this state that, where the vendor of lands enters into a contract of sale of the same with a competent purchaser produced by a land broker or agent, the subsequent inability of the vendor to convey a good title, by reason of which the contract is not performed, does not release him from the obligation to pay the agent's commission. *Potvin v. Curran & Chase*, 13 Neb. 302; *Jones v. Stevens*, 36 Neb. 849; *Lunney v. Healey*, 56 Neb. 313. This is the general

rule. *Monk v. Parker*, 180 Mass. 246; *Smith v. Schiele*, 93 Cal. 144; *Davis v. Lawrence & Co.*, 52 Kan. 383; *Phelps v. Prusch*, 83 Cal. 626; *Bruce v. Wolfe*, 102 Mo. App. 384.

The fact that the contract is canceled afterwards by mutual consent of the vendor and the vendee can in no wise affect the right of the agent to recover the agreed compensation for procuring a purchaser, where the vendee has at all times been in such a position that performance could have been enforced. *Millett v. Barth*, 18 Colo. 112; *Swigart v. Hawley*, 140 Ill. 186; note to *Breckenridge v. Claridge & Payne*, 43 L. R. A. 593 (91 Tex. 527). The same reasoning applies with reference to the liability of a general agent for the sale of lands to persons whom he may employ as subagents. In such transactions the original agent stands in the same relation to the subagent, so far as liability to pay the agreed compensation upon the furnishing of a competent purchaser, as the vendor does to him, and, when the subagent has produced a purchaser with the requisite qualifications, the liability of his principal to pay the agreed commission exists, irrespective of whether the owner of the land refuses to ratify the sale or is unable to make a good and satisfactory title. *Barthell v. Peter*, 88 Wis. 316; *Oliver v. Morawetz*, 97 Wis. 332; *Smith v. Schiele*, *supra*.

It is also argued that the plaintiffs' testimony that one of the defendants guaranteed the title to the land to be perfect cannot be of any benefit, for the reason that this alleged guarantee or warranty was not in writing, and hence is void under the statute of frauds. The contention that the statute of frauds is involved we think is unsound. The liability of the defendants does not depend upon whether the vendors were competent to convey good and perfect title. The defendants represented to the plaintiffs that they had the right to sell the lands for the owners. Even if no express representations had been made by them that the owners were competent to convey a good and perfect title the plaintiffs were justified in relying upon the implication that the persons for whom the defendants

were acting were possessed of a marketable title to the real estate. In an action by an agent against an owner, if the only reason that a sale has not been completed is that the vendor cannot furnish a good and perfect title, it is not essential to recovery by the agent that the owner had represented to him that his title is good. Neither is it so in a case of subagency. *Gorman v. Hargis*, 6 Okla. 360, 50 Pac. 92.

The giving of instruction No. 2 is complained of. This instruction in substance told the jury that if plaintiffs rendered to defendants a written account or statement of the commission due on the sale to Wheeler, and the defendants acknowledged its receipt, but made no objection, such acknowledgment is evidence of the correctness of the statement. Perhaps it would have been better to have amplified this instruction so as to explain more fully to the jury its applicability to the evidence. It applied particularly to the evidence furnished by a letter written by the plaintiffs to the defendants, and a reply to the same. These letters showed a claim was made for 10 per cent. commission on the Wheeler sale, and that no specific objection was made by the defendants to the amount. Defendants' answer to this letter speaks of a dispute between plaintiffs and one McCullough, and states that as soon as plaintiffs and McCullough come to some understanding they were ready to make a settlement concerning commissions.

It seems that McCullough had made an arrangement whereby plaintiffs were to pay him a commission of 3 per cent. on sales to purchasers procured by him, and that he had made a claim direct to defendants that commissions be paid to him, instead of to the plaintiffs. When considered in connection with all the other testimony, we cannot see how the defendants were prejudiced by this instruction being given.

It is next urged that the court erred in admitting in evidence plaintiffs' exhibit 6. This is a carbon copy of a letter, which the evidence shows was written by the plain-

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tiffs to defendants, duly stamped and addressed to defendants at their usual place of business at Colorado Springs. Notice was served upon the defendants to produce the original letter for inspection. It was not produced but it was stated at the trial that they had made a diligent search and were unable to find the same. Since the original was not accessible, and proper diligence had been exercised to procure the same, secondary evidence of the contents of the letter was admissible. *Birdsall v. Carter*, 5 Neb. 517.

Instructions Nos. 3 and 4 are correct statements of the law as applied to the facts in this case. We believe, in the light of the prior correspondence and the subsequent acts of the parties, that M. T. Yates had authority to act in the matter of commissions.

The assignments of error with respect to the giving of instruction No. 14 and the admission in evidence of the case of *Long v. Herr*, 10 Colo. 380, will be considered together, since the point involved is whether it is necessary to the validity of the contract relied upon that it should be in writing. Defendants contend that, under the provisions of section 10856, Ann. St. 1911, the contract is void. This section provides: "Every contract for the sale of lands, between the owner thereof and any broker or agent employed to sell the same, shall be void, unless the contract is in writing and subscribed by the owner of the land and the broker or agent, and such contract shall describe the land to be sold, and set forth the compensation to be allowed by the owner in case of sale by the broker or agent." We are of opinion that this section has no application to the facts in this case. The contract here does not fall within its terms. It was not made between the owner of lands and an agent. The contract was between an agent and a subagent. The statute was designed to protect the owner of lands, and we cannot extend its terms by construction or interpretation so as to embrace another class of persons. Before its passage oral contracts whereby one person employed another to procure a

purchaser for his land upon commission were valid, irrespective of whether the employing person was the owner of the premises or not. The law has been changed by the statute so far as landowners are concerned but it remains unaltered as to all other persons. *Sadler v. Young*, 78 N. J. Law, 594. Instruction No. 14, therefore, is not objectionable for the reason that the contract was not in writing, nor was the introduction in evidence of the report of the Colorado case prejudicial, even if erroneously admitted, which point we find it unnecessary to determine.

Finally, it is argued that the verdict is unsupported by the evidence, and must have been the result of passion and prejudice on the part of the jury. The evidence satisfies us that the jury were warranted in believing that the sales were made under the contract proved. We cannot say the verdict is not sustained by the evidence.

The judgment of the district court is

AFFIRMED.

ELZINA MATHEWS, APPELLANT, v. FRANK E. GILLETT ET AL., APPELLEES.

FILED FEBRUARY 10, 1912. No. 16,612.

Taxation: FORECLOSURE OF TAX LIEN: JURISDICTION. In the district court, a county's foreclosure of a tax lien on land without an antecedent administrative sale is not, on account of that omission, void for want of jurisdiction.

APPEAL from the district court for Brown county:
WILLIAM H. WESTOVER, JUDGE. *Affirmed.*

Martin Langdon, for appellant.

A. W. Scattergood, contra.

ROSE, J.

The action is ejectment, commenced October 12, 1908, for 200 acres of land in Brown county. Defendants answered that they acquired title through a tax-foreclosure sale made by the sheriff January 28, 1902, at the suit of Brown county, and confirmed by the district court February 6, 1902. Plaintiff replied that the sheriff's sale was void for want of jurisdiction, there having been no antecedent administrative sale by the county treasurer to Brown county. The present action was dismissed, and plaintiff has appealed.

To obtain a reversal, plaintiff relies on a former holding that the foreclosure of a tax lien is erroneous, unless based on a tax-deed or tax-sale certificate. *Logan County v. Carnahan*, 66 Neb. 685, 693. That rule does not apply to the present suit, which is a collateral attack on such a foreclosure. It is established by repeated decisions that the foreclosure of a tax lien on land without an antecedent administrative sale is not, on account of that omission, void for want of jurisdiction. *Jones v. Fisher*, 88 Neb. 627; *Hardwick v. Snedeker*, 88 Neb. 515; *Cass v. Nitsch*, 81 Neb. 228; *Wagener v. Whitmore*, 79 Neb. 558; *Selby v. Pueppka*, 73 Neb. 179; *Russell v. McCarthy*, 70 Neb. 514.

Complaint is made because the trial court admitted in evidence the record of the tax-foreclosure suit. The principal objection thereto was the unfounded one that the court in which the judgment of foreclosure was rendered had no jurisdiction. Objections were also made on other grounds but were properly overruled. There is no error in the record, and the judgment is

AFFIRMED.

R. H. ALLEN, APPELLANT, V. DANIEL MEETZ, APPELLEE.

FILED FEBRUARY 10, 1912. No. 16,599.

- 1. Instructions examined and referred to in the opinion, held without prejudicial error.**
- 2. Evidence examined, and found sufficient to sustain the verdict and judgment.**

Appeal from the district court for Pierce county: JOHN F. BOYD, JUDGE. *Affirmed.*

Douglas Cones, for appellant.

Mapes & Hazen, contra.

FAWCETT, J.

Action in the district court for Pierce county, upon two promissory notes given as the consideration for the purchase of a threshing machine, consisting of a separator and loader. Petition in the usual form. The answer admits the execution and delivery of the notes; alleges failure of the consideration therefor, in that the machine was defective, would not do the work for which it was designed and purchased, even after several opportunities were given plaintiff to remedy the defects; that defendant placed the machine under a shelter at his residence, and notified plaintiff that it was there, subject to his order, and that subsequently plaintiff took possession of the machine. Defendant also sets up a counterclaim, consisting of a number of items aggregating over \$800. The reply is in substance a general denial, with an allegation that plaintiff furnished an expert who adjusted and put the machinery in working order, and that defendant on October 9, 1903, and again three days later, acknowledged in writing that said machinery was operating in a satisfactory manner. There was a trial to a jury, with a verdict in favor of defendant and against the plaintiff on

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plaintiff's causes of action, and in favor of defendant upon his counterclaim, for one cent. Plaintiff appeals.

Objection is made to instructions 2 and 5, given by the court on its own motion. In each of these instructions the court is simply stating the issues, No. 5 being directed to the reply. The only objection urged to No. 5 is that it omits the allegation in the reply in relation to the written acknowledgments of October 9 and 12. We think the instruction states all that was material. The two written statements omitted were introduced in evidence, and, under other instructions properly given, plaintiff had the full benefit of both; hence, he was not in any manner prejudiced by the failure of the court to refer thereto in instruction No. 5.

We have examined the evidence, and find that it is ample to sustain the verdict of the jury.

Finding no reversible error in the record, the judgment of the district court is

AFFIRMED.

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STATE, EX REL. OVID M. KELLOGG, APPELLEE, V. CHARLES C. BARR, APPELLANT.

FILED FEBRUARY 10, 1912. No. 17,376.

1. **Pleading: SUFFICIENCY: WAIVER OF OBJECTIONS.** If an objection is made to the sufficiency of a pleading because of the omission of an allegation of some material fact, and the fact so omitted is clearly proved without objection, and the objection to the pleading is not brought to the attention of the trial court in the motion for a new trial, the objection is waived.
2. **Quo Warranto: PARTIES.** If the officials refuse to prosecute an action of *quo warranto* to try the right to a public office, the action may be brought by one who claims the right to the office as against the incumbent, and, if he verifies the information and allows it to be filed and the action begun without objection on his part, he is the real party in interest, and it is not necessary to join others who support and assist him.

3. **Elections: CONTEST: ADMISSIBILITY OF EVIDENCE.** In a trial to determine the result of an election, if the ballots and other records of the election are sufficiently identified, they should not be excluded from the evidence because of the negligence of the officers in caring for the same.
4. **Trial: ORDER OF PROOF: DISCRETION OF COURT: REVIEW.** The order of proof in the trial of a cause is largely in the discretion of the trial court, and this court will not interfere, unless an abuse of discretion is clearly shown.
5. **Evidence: IDENTIFICATION OF RECORDS: PRESUMPTIONS.** It will not be presumed that documents received in evidence were not sufficiently identified, unless that fact appears from the record as contained in the abstract.

APPEAL from the district court for Dundy county:
ROBERT C. ORR, JUDGE. *Affirmed.*

Perry, Lambe & Butler, R. D. Druliner and Ratcliffe & Ratcliffe, for appellant.

P. W. Scott and A. T. Cowings, contra.

SEDGWICK, J.

At an election held in the village of Benkelman in April, 1911, the relator and the respondent were both candidates for election to the office of trustee of the village. The votes were canvassed, and it was declared that each of these parties received the same number of votes, and the respondent, whose term then expired, insisting that there was no election, continued to hold the office. The relator brought this action in the district court for Dundy county to obtain the office. The district court found in his favor, and the respondent has appealed.

The statute provides that a trustee of the village must be 21 years of age, a citizen of the United States, or have declared his intention to become such, "who shall have been an inhabitant and taxpayer of the village at the time of his election and resided therein for three months next preceding." Comp. St. 1911, ch. 14, art. I, sec. 42.

The information alleged that the relator, at the time of the election, "was eligible to be elected to and hold the office of trustee in and for the village." It did not allege that the relator was a taxpayer in said village, but alleged all other qualifications required by the statute.

The first contention is that the information was insufficient in not alleging that the relator was a taxpayer; that the allegation above quoted was a mere conclusion of law and was insufficient. It is of course necessary to plead facts and not conclusions, and it would no doubt be better practice to allege the specific qualifications required by statute. It is not necessary to determine whether this defect would render the information demurrable, since the evidence shows, and, so far as appears from the abstract, without objection, that the relator had resided in the village for several months, and had been assessed for taxes soon after the election, and this assessment is required to be made upon property owned on the first day of April, which was prior to the election. This is conclusive that he was a taxpayer in the village at the time the election was held. The supposed defect in the petition was not brought to the attention of the court in the motion for new trial. The error, if any, was waived.

It is contended, and strenuously argued in the brief, that the plaintiff "was not the real party in interest" in this litigation, and that the county attorney had not refused or neglected to begin and prosecute the action. The county attorney was requested to bring the action at a date earlier than it was begun, but refused to so do. The fact that the information had been signed by the relator before this request was made, upon the understanding that the county attorney was not interested and would not prosecute the action, is immaterial.

The respondent alleged in his answer, and offered to prove on the trial, that there was a contest pending in the village as to whether saloons should be licensed for the ensuing year, and that parties interested in that contest desired the relator to become a member of the village

board, and encouraged the prosecution of this action, employed counsel and assisted in expenses and that relator declared himself indifferent in regard to the office. The trial court held that these facts were immaterial, and we think properly. The relator signed and verified the information and has a direct legal interest in the action. It is to be presumed that those who voted for the relator would desire him to qualify and hold the office, but this does not constitute such a direct legal interest as to make them necessary parties to the litigation.

It is contended that the ballots offered in evidence had not been properly preserved by the officials. They were not promptly delivered to the clerk after the votes had been canvassed, and the clerk left them in the vault of a bank in care of the bank officials. The respondent is right in supposing that great care should be used by public officials in preserving the ballots and other records of a public election, but there is no evidence that the relator was in any way connected with any supposed negligence of the officials; and, if the ballots and other records are fully identified, he ought not to be deprived of his right to be heard in court on account of the neglect of those officials whose duty it was to take greater care. The court was clearly right in overruling this objection.

It is insisted that the court erred in allowing a recount of the ballots before any showing was made that such recount would change the result. This objection relates to the order of proof, which is largely in the discretion of the trial court. The whole evidence shows that a recount would and ought to change the result, and we cannot see that the court abused its discretion in the order of proof.

It is also urged that the ballots and the envelopes which contained them were not sufficiently identified. One of the canvassing board was called as a witness, and testified that the ballots were placed in envelopes, and identified the envelopes and testified that some of the writing on the envelopes was in his handwriting. The abstract does not show what the indorsements on these envelopes were, but

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it does show that the ballot which was in dispute was indorsed by two persons, one of whom was a judge of election, but the abstract does not show whether the other person was or was not a judge of election. The appellant prepared an abstract, which omitted important matters bearing upon the point which he seeks to present here. The appellee prepared and filed a supplementary abstract, which is not criticised by the appellant. We do not find from these abstracts that any error was committed requiring a reversal of the judgment. The costs of both abstracts should be taxed against the appellant.

The judgment of the district court is

AFFIRMED.

E. S. JOSEPHINE TAYLOR, APPELLANT, v. W. E. HARVEY ET AL., APPELLEES.

FILED FEBRUARY 10, 1912. No. 16,841.

1. **Mortgages: FORECLOSURE: CONVEYANCES AS ONE TRANSACTION.** A deed from T. to H. and from H. to S., and a mortgage from H. to the husband of T. for a part of the consideration for the deed, with an assignment to T. by her husband, the deed from H. to S. being expressly subject to the said mortgage, all executed at the same time, will be presumed to constitute one transaction, the purpose being to convey the land to S. by T. and take a mortgage lien upon the land for a part of the purchase price, there being no other explanation of the transaction, and no evidence to the contrary.
2. ———: ———: **CROSS-DEMANDS.** Section 106 of the code requires that, when cross-demands exist at the same time, they must be held to compensate each other so far as they are equal; and this principle will be applied by courts of equity when conditions require it in order to do equity between the parties.

APPEAL from the district court for Scott's Bluff county: HANSON M. GRIMES, JUDGE. Affirmed.

L. L. Raymond, James E. Philpott and R. C. Hunter,
for appellant.

William Morrow, contra.

SEDGWICK, J.

On the 14th day of September, 1908, this plaintiff conveyed to the defendant W. E. Harvey a tract of land in question, and as part of the purchase price Mr. Harvey and his wife executed and delivered to plaintiff's husband, A. O. Taylor, a mortgage on the same land, and at the same time the plaintiff's husband assigned and delivered the mortgage to the plaintiff, and the defendant Harvey conveyed the land to the defendant corporation subject to the said mortgage. These instruments, all being executed on the same day, are presumed to be executed as a part of the same transaction, nothing appearing in the abstract to the contrary. The deed from the plaintiff to Mr. Harvey contained the usual covenant against incumbrances, and at the time it was executed and delivered the land was subject to a lien for irrigation taxes. The mortgage contained a stipulation that the mortgagor would pay all taxes thereafter assessed against the land, and that in event he failed to do so the whole sum secured by the mortgage should at once become due and payable. The mortgage by its terms would become due in March, 1916. The taxes of 1908 became a lien upon the land and became due and payable, and the plaintiff began this action to foreclose the mortgage, and declared the whole amount due on account of the default of the defendants in paying the general taxes that had become due. The irrigation taxes, which constituted an incumbrance upon the land when the plaintiff deeded the same, were much more than the general taxes that accrued thereafter for which the mortgagor was liable, and the trial court offset the general taxes against the irrigation taxes, and rendered a judgment in favor of the defendants and against the

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plaintiff for the difference, and dismissed the plaintiff's action for a foreclosure of her mortgage. The plaintiff has appealed.

The plaintiff contends in the brief that the existence of the irrigation taxes against the land at the time she conveyed the same, with covenants against incumbrances, constituted a breach of that covenant at the time the deed was made, and that this became a claim against the plaintiff in favor of the defendant Harvey, and that, as Harvey has conveyed the land to the defendant corporation, defendant cannot now avail itself of the plaintiff's breach of the covenant against incumbrances as a defense in this action. The deeds and the mortgage and the assignment of the mortgage, as before stated, were made at the same time, and presumably as a part of the same transaction, for the purpose of transferring the land to the irrigation company, with a mortgage lien to the plaintiff for the unpaid purchase price. The plaintiff in her reply asks the court to treat these respective claims as arising out of the same transaction, and as properly compensating each other, in the following allegation: "Plaintiff offers to allow to be deducted from the amount found due plaintiff here any sum which may be adjudged by the court as legally due from her as taxes on the said premises or any part thereof, or to pay the same into court as by the order of the court made therein, upon the payment of the amount due her on said note and mortgage." The plaintiff's husband manifestly had no interest in the transaction, except such incidental interests as arise from marital relations, and all of the parties interested were before the court in an equitable proceeding in which the court was asked by the plaintiff to adjust the matters existing between them. This the court did, and we think, in any view of the legal questions that are discussed in the briefs, this action of the court was right. When this action was begun both of these claims for taxes existed at the same time, and should in equity be held to compensate each other, as provided in section 106 of the code. Under these circumstances the

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defendant cannot be said to be in default for not having paid the general taxes; the plaintiff's action was prematurely brought, and for that reason properly dismissed. This dismissal will not bar another action upon default in the conditions of the mortgage.

The judgment of the district court is

AFFIRMED.

**J. K. ARMSBY COMPANY, APPELLANT, v. RAYMOND
BROTHERS-CLARKE COMPANY, APPELLEE.**

FILED FEBRUARY 29, 1912. No. 16,563.

OPINION ON motion for rehearing of case reported, *ante*, p. 553. *Rehearing denied.*

PER CURIAM.

Complaint is made in a motion and brief for rehearing that in reversing a law action this court is without jurisdiction to direct the district court to render judgment in favor of either party. It is further stated that defendant desires to amend its answer in the court below. The first point must be decided adversely to defendant's contention under the authority of section 594 of the code, which provides: "When a judgment or final order shall be reversed either in whole or in part, in the supreme court, the court reversing the same shall proceed to render such judgment as the court below should have rendered, or remand the cause to the court below for such judgment." This provision of the code has been followed in *Story v. Robertson*, 5 Neb. (Unof.) 404; *Chicago, B. & Q. R. Co. v. Yost*, 61 Neb. 530; *Robertson v. Brooks*, 65 Neb. 799; *American Surety Co. v. Musselman*, *ante*, p. 58.

The statement that defendant desires to amend its answer in the court below should not be considered now. No reason is assigned why the amendment was not made

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prior to the first trial. The request comes too late after protracted litigation. *Gadsden v. Thrush*, 72 Neb. 1.

The motion for rehearing is

OVERRULED

CLYDE C. MOSSLANDER, APPELLEE, v. GEORGE C. ARMSTRONG, APPELLANT.

FILED FEBRUARY 29, 1912. No. 16,597.

1. **Physicians and Surgeons: MALPRACTICE: ADMISSION OF EVIDENCE: HARMLESS ERROR.** In an action against a physician and surgeon for damages arising from the alleged unskilful treatment of plaintiff in an effort to cure an injury resulting from an accident, a witness, who was a nurse, was permitted to testify that from a conversation she had previously had with the defendant, which she detailed, she did not think his standard of "technique" was equal to the standard of other physicians in the locality in which he resided and practiced his profession. *Held*, That the admission of the evidence over defendant's objection was erroneous, but that in view of the instructions of the court, and the testimony of other physicians as to defendant's reputation and standing as an educated and competent physician and surgeon, the error was without prejudice.
2. **Trial: INSTRUCTIONS.** In considering an instruction stating the averments of a pleading, effect will be given to the whole thereof, and not to a technical error in the failure to use apt language, if it sufficiently contains the substance of such pleading and is not liable to be misunderstood by the jury.
3. **Pleading: SUFFICIENCY OF REPLY.** "The reply should show specifically what allegations of the answer are denied, but if a reply denies 'each and every allegation of new matter' and is not assailed by motion, it will be held good after verdict." *Western Mattress Co. v. Potter*, 1 Neb. (Unof.) 627.
4. **Physicians and Surgeons: MALPRACTICE: INSTRUCTIONS.** Plaintiff asked and the court gave an instruction to the effect that defendant had no right to make any other or different incision in plaintiff's foot than he had obtained permission or plaintiff had requested him to make. Defendant asked and the court gave an instruction that "consent to an operation will be pre-

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sumed from voluntary submission to it, and the burden is on the plaintiff to prove the contrary." *Held*, That the two instructions, when taken together, correctly state the law.

5. Instructions given and refused are examined, and no prejudicial error is found therein.
6. Damages. The damages awarded by the jury are examined and found not so excessive as to require the intervention of the court.
7. Appeal: AFFIRMANCE: COSTS. The verdict awarded \$2,000 as damages, and to which was separately added \$169.13 as interest, making a total of \$2,169.13, for which judgment was rendered. After the appeal was taken by defendant, and all briefs filed, plaintiff filed a remittitur of \$169.13, the interest allowed, and asked that the judgment be modified and affirmed for \$2,000. *Held*, That the judgment would be so modified and affirmed, but that all the costs made after the rendition of the judgment by the district court, including the costs of the supreme court, should be taxed to plaintiff.

APPEAL from the district court for Furnas county:
ROBERT C. ORR, JUDGE. *Affirmed*.

W. S. Morlan, for appellant.

Perry, Lambe & Butler, contra.

REESE, C. J.

This is an action by the plaintiff against the defendant, a physician and surgeon, for damages alleged to have been sustained by reason of the negligent and unskilful treatment of plaintiff as the patient of defendant in and about the treatment of plaintiff, who had been injured by stepping upon a sewing needle, which had punctured his foot, and the point of the needle was supposed to have remained within the punctured wound in the ball of the foot near or about the joint of the great toe. No serious question arises with reference to the pleadings. The facts alleged, and so far as undisputed, are that late in the evening, or early morning, on or about the 7th day of August, 1908, plaintiff stepped upon an ordinary sewing needle on or in

the carpet in his bedroom and by which the needle was driven into his foot, puncturing it. At the time of the accident plaintiff searched the floor for the needle, and found that it had been broken into probably three pieces, two of which, constituting the major portion of the needle, were found, the remainder, consisting of the point, was not found. The next morning he called at defendant's office, when defendant made an incision into the foot in search for the needle-point, but none was found. The foot became infected. Two other incisions were made in the effort to arrest and cure the blood poisoning, but seemed not to be successful, when other physicians were called, and it was found necessary to amputate the great toe, which was done, and soon thereafter plaintiff was removed to a hospital, where a recovery followed. The chief contention upon the trial arose over the question of the care and skill, or want thereof, in the use, or failure to use, proper antiseptics in the surgical treatment of plaintiff's foot by defendant; it being alleged and claimed by plaintiff that, by reason of the failure of defendant to guard against infection, the blood poisoning was promoted and the amputation rendered necessary. The testimony as to the course pursued by defendant in the treatment of plaintiff's foot is sharply conflicting on almost every feature of the case. The result of the trial was a verdict in favor of plaintiff, upon which judgment was rendered. Defendant appeals.

The errors assigned in this court are: First. "Errors of law occurring on the trial and duly excepted to by the defendant." The second to the eleventh, inclusive, consist of alleged errors in giving certain instructions to the jury and in refusing to give instructions asked by defendant—the instructions being separately referred to in the assignments; twelfth and thirteenth, that the damages are excessive.

Under the first assignment, the only question discussed in defendant's brief is as to alleged errors of the court in admitting immaterial and irrelevant testimony. The tes-

timony objected to is too long to be here copied. It is the testimony of a nurse, who attended plaintiff at the hospital to which he was removed, and who had waited upon him to some extent at his home before his removal, and which may be epitomized to be: That she was familiar with the standard of technique used in the hospital where she was employed and among physicians and surgeons in that vicinity; that the standard was that before a surgical operation is performed, and during the time, "the instruments are thoroughly sterilized and the dressings are thoroughly sterilized, and the patient is prepared for several days prior to a major operation;" that she was acquainted with defendant, and had had occasion to learn from him what his opinion of that standard was; that some three weeks prior to plaintiff's accident she had a conversation with defendant, in which they discussed surgery in general, and he gave his idea of asepsis; that he stated that certain well-known and leading surgeons in Illinois and Minnesota played to the galleries, and that he could "go out into the country and take a bar of White Russian soap and prepare a patient for an operation in ten minutes and get the same results that those surgeons could in their weeks of preparation;" that defendant's opinion of technique was not up to the other physicians in the community where he resided and practiced, but was below them. The definition and description of "technique" was not objectionable, the witness showing some knowledge upon the subject, and it could result in no possible prejudice to defendant, for all the physicians who testified upon that matter fully agreed with her, but with more elaboration. There was no difference upon that subject. Her comparison of defendant's views and his standard of technique with other physicians was objectionable, and the objection should have been sustained. We know of no rule of law or evidence which sanctions such a procedure. In addition to the evidence of defendant's high standing in his profession, the court, upon the request of plaintiff, instructed the jury that the question of defend-

ant's liability did not depend upon the skill he possessed, but upon whether he applied that reasonable degree of skill and diligence ordinarily possessed and used by other physicians in that and similar localities. This eliminated the question of his knowledge of technique. The statute (code, sec. 145) provides that courts "must disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment shall be reversed or affected by reason of such error or defect." The question then arises: Did the error have that effect, or could it? From a reading of the bill of exceptions, it must be conceded that the learning and ability of defendant as a physician and surgeon was fully and completely established and shown by the testimony of all the men of the profession who testified upon that subject. They were interrogated by defendant's counsel directly and explicitly thereon, and, indeed, there was no contrary contention. It is to be observed that the nurse testified only as to defendant's "standard of technique," and not as to his knowledge, ability or standing generally in his profession. While the admission of the evidence was erroneous, we are unable to see that any prejudice resulted, or could result, therefrom.

There is also some objection to the admitted testimony of plaintiff and one of the physicians who was called as a witness by him. Upon a careful consideration of the rulings complained of, we are unable to see any reversible error, and will not notice the subject further.

The next contention is that there was manifest error in the instructions given to the jury. The transcript contains 36 instructions given. That the jury were thoroughly instructed cannot well be doubted in so far as volume is concerned. The practice of overloading juries with a great number of instructions has been freely condemned by this court. As we said in *City of Beatrice v. Leary*, 45 Neb. 149: "Instructions in a case should be few in number and should present to the jury the law applicable to the issues in the case in simple language and

terse sentences." But "a judgment will not be reversed on account of the number of instructions given to the jury by the trial court, unless it clearly appears that the party complaining is prejudiced thereby." *Omaha Street R. Co. v. Boesen*, 68 Neb. 437. No objection is made on this ground, but we deem it proper to refer to it.

The brief of appellant consists of 28 pages of carefully prepared criticisms upon instructions given and the action of the court in refusing to give a portion of those requested by defendant. Many of the points presented are quite technical and not entitled to consideration. Where not contradictory, instructions should be considered as a whole.

The first instruction given by the court upon its own motion is of considerable length and will not be copied. It consists of a statement of the averments of the petition. The opening sentence is that the action is brought "to recover the sum of \$5,000 as damages, on account of the failure of the defendant to properly treat and care for an injured foot of the defendant." (The word "defendant" is conceded to be a clerical or inadvertent error.) The objection to the instruction is that it fails to use the word "alleged" or one of similar import, but practically informs the jury that there was a failure to properly treat plaintiff's foot and the suit is brought on that "account." It is true that the instruction would have been more skilfully drawn had it contained a statement of what the *allegations* of the petition were, instead of telling the jury what the suit was *for*. The language above quoted is followed by a statement of what the plaintiff "alleges in his petition," and the statement properly covers those allegations. We can detect nothing which by any reasonable interpretation could, in view of other instructions, have any tendency to mislead the jury as to what the issues were. The second and third instructions in a condensed form fully state the contents of the answer that it admitted that he was a physician and surgeon, denied all other allegations of the petition, and alleged that whatever damages plain-

tiff sustained, if any, were by reason of his own contributory negligence.

The third instruction told the jury that the reply denied "each and every allegation of new matter" in the answer. Objection is made to the words "new matter." These words are copied from the reply. The attack should have been made upon the reply, instead of upon the instruction, which followed its language. In *Western Mattress Co. v. Potter*, 1 Neb. (Unof.) 627, we held that, "if a reply denies 'each and every allegation of new matter' and is not assailed by motion, it will be held good after verdict." It is also the well-settled law of this state that if a cause is tried upon the theory that the averments of an answer are denied, even if no reply is filed, objection cannot afterward be successfully made to the pleadings in that regard.

In instruction numbered 4½, informing the jury of the material allegations of the petition which must be established by plaintiff, the fourth subdivision thereof was that, "on account" of the negligence, etc., the plaintiff suffered the injuries complained of. In other words, the jury must find that the injury was suffered on account of the negligence. The same meaning would have been conveyed had the language been "by reason of." The contention is without merit.

The petition alleges that the treatment of plaintiff's foot by defendant was careless, negligent, and unskilful. There was evidence which tended to prove that an incision made in plaintiff's foot, so soon after he had stepped upon and punctured his foot with the needle, was not skilful nor necessary treatment. Plaintiff testified that he was not asked for, nor did he give, his permission to the making of that incision. The court instructed the jury that defendant "had no right to make any other or different incision in the foot of the plaintiff than defendant had obtained permission or plaintiff had requested him to make." The defendant asked and the court gave instruction numbered 14 of those requested by him, in which it is said: "Consent to an operation will be presumed from

voluntary submission to it, and the burden is on plaintiff to prove the contrary." These two instructions, when taken together, stated the law correctly. That consent is a necessary prerequisite to an operation where no emergency exists rendering it impracticable to confer with the patient, see 30 Cyc. 1576; *Mohr v. Williams*, 95 Minn. 261; 1 Kinkead, Commentaries on Torts, sec. 375. But that consent will be presumed in the absence of fraud or misrepresentation, see *M'Clallen v. Adams*, 19 Pick. (Mass.) 333. It is true, as insisted by defendant's counsel, that instructions must be based upon the pleadings. The petition alleged the careless, negligent and unskilful treatment, and testimony was introduced to show that the operation was a part of the unskilful treatment. Even though the operation might not have been necessary, yet, had plaintiff requested or consented to the operation, such consent or request would be a defense, in so far as that part of the case was concerned.

Complaint is made that the court refused to submit defendant's theory of the case to the jury by proper instructions. This contention is not sustained by the record. There were 11 instructions given upon defendant's request. These, with the instructions given by the court upon its own motion, sufficiently submitted all material phases of the case. The first instruction asked by defendant and refused does not contain a correct statement of the law. It is to the effect that if plaintiff's foot was infected at the time he first called upon defendant for treatment, and that such infection produced the injury complained of, the verdict must be in favor of defendant. This left the question of unskilful treatment subsequent to the beginning of the treatment entirely out of the case. The proof is clear that infection can often be successfully treated. There was no error in the refusal to give the instruction. The second instruction, also refused as asked, but modified and given, was in part a repetition of the first. The remainder thereof was sufficiently covered by its modification by the court and other instruc-

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tions given. Other instructions are criticised with the technical nicety of a purist. We are unable to find anything therein which can fairly be said to be prejudicial to defendant.

It is insisted that the damages awarded are excessive. The verdict and judgment were for the sum of \$2,000, plus interest to be hereafter noted. A resume of the evidence can hardly be said to be necessary here. If defendant was negligent (and of that the jury were the judges), and if plaintiff was guilty of no contributory negligence (and of which the jury were the judges under the evidence), and his sufferings and present and past conditions are attributable to the negligence of defendant (and of which the jury were the judges), the verdict, while probably somewhat liberal, cannot be said to be so far in excess of compensation as to require the interference of the court.

By the verdict the jury found in favor of plaintiff and assessed "the amount of his recovery at the sum of \$2,000, and interest thereon at the rate of 7 per cent. per annum from the 12th day of August, 1908, a total of \$2,169.13," for which amount judgment was rendered. It is conceded by plaintiff that he was not entitled to interest on the damages assessed, and he filed a remittitur of the interest allowed by the jury, and consents that the judgment be modified and affirmed for \$2,000 as of date of its rendition, to wit, October 30, 1909. The judgment will therefore be so modified. The remittitur was filed in this court after the appeal had been taken and all briefs filed. Therefore the costs made after the rendition of the judgment by the district court and the costs in this court will be taxed to plaintiff.

The judgment of the district court for and to the amount of \$2,000 is affirmed, and the costs taxed to plaintiff as above.

AFFIRMED.

SEDGWICK, J., dissenting.

1. It appears from the opinion that the nurse, when

upon the witness stand, testified to her opinion as to the quality of the defendant's technique. She testified that it was in her judgment not as good as other physicians' in that neighborhood whom she mentioned. By technique she meant the proper and necessary preparation, the cleansing of the wound and of the instruments, etc. If he did not attend to this properly he was negligent and would be liable for the consequences. The measure of the care required from him would be that which was recognized as necessary by the profession in that locality, so that when this witness stated her conclusion upon that point she appears to have stated the precise thing that the jury were called upon to determine. Generally, we have held such evidence to be prejudicial.

2. The third paragraph of the syllabus does not meet any contention of the parties. It is not insisted in the brief that the reply was insufficient. The point made in the brief is that the instruction of the court did not plainly state the issue. The court told the jury that the defendant denied the allegations of "new matter" in the answer, but did not tell the jury what those allegations of new matter were, and so did not tell the jury what the plaintiff denied in the reply. This is the point made in the brief and is not determined in the opinion. This objection seems to be well taken.

3. Again, the discussion in the fourth paragraph does not meet the point raised by the defendant. He does not insist that these two instructions, taken together, do not correctly state the law. He admits that they do, but what he says is that they state the law upon an issue that was not in the case at all, and that, under the circumstances, this statement was very misleading to the jury. This is the reason he criticises this instruction; that is, he objects to the court putting before the jury the issue as to whether the plaintiff consented that the defendant should make an incision in the foot. And the objection seems to have merit.

4. The fifth paragraph approves of the instructions in

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bulk without mentioning them. The defendant asked the court to instruct the jury as follows: "The court instructs the jury, if you find from the evidence that plaintiff's foot was infected at the time he first came to defendant for treatment, that such infection produced the injury of which plaintiff complains, and that ordinary care, skill and diligence on the part of the defendant would not have prevented such injury, then it is immaterial whether defendant used ordinary care, skill and diligence, and your verdict must be for the defendant." The court modified the instruction by adding to it the following: "That is, if he used ordinary skill, care and diligence, considering that infection already existed, in caring for the same." This modification made the instruction unintelligible. The instruction, as offered, stated that it was immaterial whether the defendant used ordinary care, skill and diligence under the conditions recited in the instruction, and this modification tells the jury that this is so if he did use ordinary care, skill and diligence, considering that infection already existed. The instruction, as offered, was technically correct. I suppose it must be true that if the foot was so infected at the time that the defendant was first called that ordinary care, skill and diligence on the part of the defendant would not have prevented the injury complained of, the plaintiff could not recover. The court might have given another instruction, plainly stating the idea involved in the offered instruction, and so framed it that there would be no danger of misleading the jury. I think that this instruction, as modified, was erroneous.

GUSTAVUS A. LONGNECKER, APPELLANT, v. EDWIN LONG-
NECKER, APPELLEE.

FILED FEBRUARY 29, 1912. No. 16,618.

1. Appeal: DISMISSAL OF ACTION: PLEADING AND PROOF. In a suit aided by attachment proceedings for the recovery of money

loaned or advanced under an alleged oral agreement of repayment, if the plaintiff's undisputed evidence is insufficient to sustain a judgment in his favor, and clearly shows that his action should have been one for an accounting between partners, it is not reversible error for the court to sustain a demurrer to the evidence and dismiss the action.

2. —: **AFFIRMANCE.** Where the judgment of the district court is proper upon the undisputed facts shown by the record, it will be affirmed, without considering whether the reasons given by the trial judge for his conclusion were competent and adequate to support the same. *Bowhay v. Richards*, 81 Neb. 764.
3. —: **QUESTIONS REVIEWABLE.** On appeal in such a case, this court will not consider errors alleged to have been committed in matters of practice or procedure.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Affirmed.*

Burkett, Wilson & Brown, for appellant.

A. J. Sawyer and Joseph Wurzburg, contra.

BARNES, J.

Action, aided by attachment proceedings, to recover money alleged to have been loaned or advanced by the plaintiff to the defendant to carry on certain partnership mining operations, under an alleged oral agreement that the defendant would reimburse the plaintiff therefor. The defendant had the judgment, and the plaintiff has appealed.

It appears that on the 1st day of April, 1873, in Cumberland county, Pennsylvania, the plaintiff and the defendant, who are brothers, entered into a written agreement by which it was provided, in substance, that the defendant, who was an officer in the United States navy, should provide the plaintiff, a young mining engineer, with the necessary funds for prospecting and opening mines, and that, after the sale of any iron ore or other minerals, the plaintiff, from the time of such sale, should bear an equal proportion of the expense; that plaintiff was to do

the leasing, prospecting, developing and practical running of the business, the defendant to be what is known as a silent partner of the firm. It was further provided that all leases, contracts, sales and books of the firm should be kept by and in the name of the plaintiff, and that either partner should have access to the books of the firm at such time as he might feel disposed to examine the same, and that all transactions of the firm should be duly recorded in and after the manner of bookkeeping, as it is generally known in commercial enterprises. No time was fixed for the termination of the partnership. The record discloses that the defendant furnished the money to carry on that part of the business known as the prospecting and opening of mines until about the 1st of September, 1878, and thereafter declined to advance any more money for that purpose, or to further continue the business. The plaintiff alleged in his petition that the defendant, after refusing money to carry on the partnership business, orally agreed that the plaintiff should go forward with the development, equipment and prospecting for new mines with whatever moneys the plaintiff should put in and advance for that purpose, and that the defendant would reimburse the plaintiff therefor within a reasonable time, together with interest thereon; that, pursuant to said contract and understanding, the plaintiff proceeded to lease, develop and equip mining properties, and expended therein on behalf of the defendant large sums of money, relying upon such mutual understanding that the defendant would reimburse the plaintiff for moneys so expended by the plaintiff on his behalf; that from the 12th day of January, 1879, to the 1st day of April, 1906, he expended in said enterprises the sum of \$31,400.87; that he was entitled to interest on the sum so invested; and prayed judgment against the defendant for the sum of \$29,767.48, together with interest thereon from the 1st day of September, 1907.

For answer to the plaintiff's petition, the defendant entered a plea to the jurisdiction of the court; alleged that

the plaintiff's action was in truth and in fact a suit in equity for an accounting between partners; that no accounting or settlement had ever been had between them; and alleged that the plaintiff's right of action was barred by the statute of limitations, in that it did not accrue to the plaintiff within four years next preceding the commencement of the action. Defendant admitted the making of the written contract; alleged that he had furnished money thereunder to the plaintiff, amounting to \$5,300, and upwards; admitted that plaintiff opened some mines in York county, Pennsylvania; alleged that plaintiff took complete charge of the business and had the books and records under his control, and from about the year 1888 refused to give the defendant any information concerning the said partnership business, although often requested so to do, and declared to defendant that he, the defendant, had no interest in such partnership business. Defendant denied the making of the alleged oral agreement, and averred that there was no understanding or agreement of any kind between the parties, except the written partnership agreement set out in the plaintiff's petition. Defendant also alleged that he was informed and believed that plaintiff had sold 140,000 tons of ore and appropriated the proceeds to his own use, and refused to render any account therefor, though often requested so to do; that the defendant had not conversed with or seen the plaintiff since about the year 1890, when the partnership was by both parties considered and treated as abandoned and at an end because of the defendant's exclusion therefrom by the plaintiff; that in 1890 defendant began, in the court of common pleas of Cumberland county, Pennsylvania, a court of competent jurisdiction, and in which state both parties then resided and still reside, a suit in equity against the plaintiff for an accounting of their partnership business; that said suit was still pending and undetermined; and that, though the defendant had entered an appearance therein, he had never filed any answer or submitted any statement or account of the

partnership business; and that said suit is a bar to this action; that in July, 1899, plaintiff, without consulting the defendant, and without his knowledge, entered into a partnership in the same business with one John M. Myers, and prosecuted said business without the consent or knowledge of the defendant, in Hastings county, Ontario, and never gave the defendant any information in relation thereto. The answer also contained other matters which need not be stated in order to dispose of the questions presented by the record. The reply, in substance, was a general denial of the matters alleged in the defendant's answer.

Upon the trial in the district court for Lancaster county the plaintiff testified in his own behalf in relation to the alleged oral contract, as follows: " 'Well,' I says, 'maybe in the matter of equipping this mine, if the panic strikes me next year, I may be in debt, maybe \$8,000 or \$10,000.' He says, 'I don't think that will occur. You go ahead and equip it,' and he says, 'If it should unfortunately terminate in that manner I will make it good. I will see you don't get stuck,' or words to that effect." On cross-examination plaintiff restated the agreement, in substance, as follows: While there were numerous conversations covering a long period of years, I am safe in saying on that very subject that I raised yesterday, and fixed the date as 1878, that was discussed from the time I discovered the ore at Dillsburg in 1876, how we would go about to proceed to equip and furnish this operation with necessary machinery and mine the ore. He positively assured me that in case of failure, panic or otherwise, he would stand by me and see that the money was returned in case of loss and the creditors paid, as his salary was sufficient; and other items which I might state, and go into details and make it very lengthy, if you want me to; that was about the substance of the conversation. Plaintiff also admitted on cross-examination that in 1878 he mined and sold ore, but insisted that such sales were in small quantities. He also admitted that he had refused to make

any statement to the defendant as to the condition of the partnership affairs, and had also refused to allow him to examine the books, giving as his reasons that the defendant was not entitled to know anything about the business until he reimbursed the plaintiff for the several amounts which he claimed to have advanced to him under the alleged oral agreement. The plaintiff further testified that he abandoned their Dillsburg mine, went to Canada and formed a partnership with one Myers to work certain mines or purchase a large quantity of ore in that country without the knowledge or consent of the defendant; that he put into and lost \$5,000 by that venture, and he now seeks to charge the defendant with one-half of that loss. He also stated that he had formed a partnership with one Miller, in which he lost heavily; that he had for many years engaged in farming, and had worked during the time covered by his alleged losses and expenditures for other mining companies and corporations from time to time on a salary; that he had at all times refused to render to the defendant any account of the alleged partnership business; that at one time he had borrowed about \$600 of the defendant on a direct promise to repay it, but had never fulfilled his promise. Finally, as a part of the plaintiff's cross-examination, a letter written by him to the defendant was put into the record, which is dated July 30, 1887, in which he stated, among other things, that he had shipped and sold 14 car-loads of iron ore in four days, and in which he also said: "In regard to your money business, I propose to pay you all I owe just as soon as I get it."

At the close of the plaintiff's evidence the defendant demurred to its sufficiency, and also asked leave to amend his plea of the statute of limitations, so as to set forth therein the statutes of the state of Pennsylvania. Leave to make the amendment was granted, over the plaintiff's objections, and the statute of limitations of that state was read and transcribed by the reporter and was copied into the record. The court thereupon sustained the demurrer

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to the plaintiff's evidence, and dismissed the action for the following, among other reasons: That plaintiff had failed to show any right to be reimbursed for his alleged advancements to the partnership; that his action should have been one for an accounting between partners, and that the present action was barred by the statute of limitations. In response to a question by plaintiff's counsel, the court stated that the action was dismissed for want of jurisdiction, and, in answer to a question of counsel for defendant, the court also declared that his entry would be just simply for a dismissal, without stating the grounds. The brief of counsel for the plaintiff contains several assignments of error which go to questions of procedure, and which are ably argued at great length, but it may be said if the judgment complained of is right, and is the only one which ought to have been rendered, then the errors complained of need not be considered.

In *Bowhay v. Richards*, 81 Neb. 764, it was said: "Where the judgment of the district court is proper upon the undisputed facts shown by the record, it will be affirmed, without considering whether the reasons given by the trial judge for his conclusion were competent and adequate to support the same."

From a careful reading of the whole record, we are satisfied that the judgment of the district court sustaining the defendant's demurrer to the plaintiff's evidence was correct, and its correctness is not challenged by the plaintiff either upon principle or precedent. It follows that the action was properly dismissed.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

JOHN T. HILL, APPELLANT, v. JOHN FEENY, APPELLEE.

FILED FEBRUARY 29, 1912. No. 16,744.

1. Judgment: REVIVOR: PLEA OF PAYMENT: BURDEN OF PROOF. In a proceeding to revive a dormant judgment, where the judgment debtor pleads payment, a presumption of payment arises, and the burden is upon the judgment creditor to rebut that presumption. *Platte County Bank v. Clark*, 81 Neb. 255; *Wittstruck v. Temple*, 58 Neb. 16.
2. Evidence examined, and held insufficient to overcome the presumption of payment.

APPEAL from the district court for Adams county:
GEORGE F. CORCORAN, JUDGE. *Affirmed*.

J. E. Willits, for appellant.

John C. Stevens, contra.

BARNES, J.

Proceeding to revive a dormant judgment. The defendant contested the revivor on two grounds: First, that the plaintiff was not the real party in interest or the owner of the judgment; second, by an answer of payment. The defendant prevailed, and the plaintiff has appealed.

It appears that in the year 1890 the Blue Ridge Marble Company, doing business at Nelson, in the state of Georgia, obtained a judgment in the county court of Adams county against John Feeny and Charles Feeny, partners as John Feeny & Son, for \$414. At the time the judgment was obtained the plaintiff in the action was represented by the law firm of Dilworth, Smith & Dilworth, who appear to have had no other connection therewith; that in 1891 an execution was issued upon the judgment, which was returned by the officer as wholly unsatisfied; that shortly subsequent to that time the collection of the judgment appears to have been entrusted to an attorney named John A. Castro; that from the year 1891

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to the time when the proceeding to revive the judgment was commenced no execution was ever issued thereon, and it appears that no attempt was made by any one to collect it from the present defendant Charles Feeny, who is the surviving member of the firm of John Feeny & Son. It further appears that John Feeny died about 14 years before the commencement of this proceeding. The elder Mr. Dilworth, of the firm of Dilworth, Smith & Dilworth, is dead, and the testimony of the younger Dilworth was not taken in this proceeding. Smith, however, testified that he had nothing to do with the claim since about 1893. It also appears that an application was made by the original plaintiff to revive the judgment, and a motion for security for costs was interposed for the reason that the plaintiff was a nonresident of this state; that, thereupon, the proceeding was dismissed, the judgment was assigned to the appellant herein, and the present proceeding was instituted.

To support his alleged ownership, the appellant testified that he purchased the judgment and took an assignment thereof executed by Mr. Willits, as attorney for the marble company; that in payment for the judgment he gave his note for \$200, due in one year without security; that at the time of the trial the note was long past due, and had not been paid, and that payment of the note had never been demanded of him. He further testified that when he purchased the judgment he made no examination of the record to see whether there was any such judgment in existence, and that he would rather there would not have been a judgment.

To support the issue of nonpayment, the president of the marble company testified, over the objections of the defendant, that there were no entries in the books of the company showing payment of the judgment; and testimony to the same effect was given by a Mr. Bane, the present treasurer of the company. The appellant testified that he was still the owner of the judgment; that he knows Charles Feeny, the surviving defendant therein, and that

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Feeny had never paid him anything on the judgment. On the other hand, the defendant testified that at one time he was a member of the firm of John Feeny & Son; that his father died 14 years ago; that his father was the active manager of the business; that he remembers the time when the execution was issued on the judgment, and that John A. Castro was then acting for the marble company; that a compromise was effected, and the judgment was then paid and satisfied, and he contributed the sum of \$80 for that purpose; that from the time of that settlement until the present proceeding was commenced he never heard anything about the judgment, and no demand had been made upon him for its payment.

Some testimony was introduced tending to show that in 1890 the firm of John Feeny & Son executed a chattel mortgage upon their property, and it is contended that they were therefore insolvent, and that fact is tendered as an excuse for the failure of the marble company to keep the judgment revived, or make any attempt to obtain payment thereof.

Upon this evidence, the district court for Adams county found generally for the defendant, upon the issues joined, and dismissed the proceeding.

It is contended by the appellant that the testimony was sufficient to rebut the presumption of payment which necessarily arises from the facts above stated. On the other hand, defendant has directed our attention to *Platte County Bank v. Clark*, 81 Neb. 255. There the facts were quite similar to those in the case at bar, and it was held: "In a proceeding to revive a dormant judgment, where the judgment debtor pleads payment, a presumption of payment arises, and the burden is upon the judgment creditor to rebut that inference." In the opinion in that case it was said: "Not an admission, express or implied on the part of the appellants, that the debt is unpaid is shown; not an excuse or reason is given for this long delay in attempting to collect the judgment. In the meantime the original judgment creditor has gone out of

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business, one of the mesne assignees has removed from the state, one is dead, and the present owner does not testify because of her mental condition. Finally, one of the judgment debtors has become incompetent. There being no individual, or collection of persons, having actual knowledge of the fact, to appear and testify that the debt has not been paid, it seems to us the presumption of payment can only be rebutted by proof of some intervening fact transpiring within a reasonable time, such as a payment of part of the claim, an admission on the part of those to be charged that the debt is unpaid, proof that the debtors have been insolvent and unable to pay, or by proof of some other fact or circumstance, the legitimate tendency of which is to make it more probable than otherwise that the judgment has not in fact been paid. * * * We do not consider that the legitimate tendency of the evidence presented is sufficient to overcome the presumption of payment." If, as was there held, the evidence was insufficient to overcome the presumption of payment, it would seem clear that in the case at bar the district court was justified in arriving at the conclusion that the evidence was insufficient to establish nonpayment and entitle the plaintiff to an order of revivor.

It may also be said that it may be assumed that the general finding of the district court embraced a finding that the plaintiff was not the real party in interest, and was not the owner of the judgment sought to be revived. It follows that upon this record we would not be justified in setting aside the findings and reversing the judgment of the trial court.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

LETTON, J., not sitting.

JOSEPH W. GRAY ET AL., APPELLEES, v. CHICAGO, ST. PAUL,
MINNEAPOLIS & OMAHA RAILWAY COMPANY, APPEL-
LANT.

FILED FEBRUARY 29, 1912. No. 16,566.

1. **Trial: INSTRUCTIONS: ABANDONMENT OF ISSUE.** Where at the trial no attempt is made to prove some of the allegations of the petition and plaintiffs abandon one of the grounds upon which they base their right to recover, the issues made by the pleadings as to such matters should be eliminated from the charge to the jury.
2. **Waters: OBSTRUCTION OF WATERCOURSE: LIABILITY FOR DAMAGES.** Where, about 20 years before the damages complained of, the channel of a natural stream was extended by a ditch, which had been properly established and suitably constructed by the county authorities under the drainage laws, so that the stream flowed under a railroad trestle bridge, and has so continued to flow, and the trestle bridge as originally built was large enough to allow ample opportunity for flood-waters to escape when they overflowed the banks of the ditch, the duty of the railway company with respect to keeping and maintaining a sufficient opening to permit the waters of the stream to pass became the same as it would be if the extended creek channel had been the natural channel, and if any damages were caused by the careless and negligent obstruction of a proper passageway the railway company would be liable for such damages.
3. ———: ———: ———. If, however, in such case, the filling up of a proper and sufficient waterway for the flood-waters was not occasioned by obstructions negligently permitted to remain in and about the trestle, but was caused by a gradual deposit of silt brought down through the extended channel of the creek, and by which gradual deposit the elevation of a portion of the land above the trestle not upon the defendant's right of way was raised to such an extent as to prevent the flood-waters reaching the trestle at the time of the damages complained of, then the defendant cannot be held liable for such damages.
4. **Drains: OBSTRUCTIONS: DUTY OF COUNTY.** It is the duty of county authorities, under chapter 89, Comp. St. 1907, to keep the channel of a county ditch free from obstructions.
5. **Limitation of Actions: ACCRUAL OF CAUSE OF ACTION.** Where crops are destroyed by the negligence of a railway company in permitting a waterway which it was its duty to keep open

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to become obstructed, the cause of action for such damages accrues at the time the crops are destroyed.

6. **Pleading: AMENDMENT OF REPLY.** Where the answer alleged that at the time the crops were planted the plaintiffs knew of the conditions, and that in all probability they would be destroyed by flood-waters, it is not error to permit an amendment to the reply setting forth that before the crops were planted the defendant company through its agent promised to clear the water-way so as to drain the plaintiffs' lands, and to admit in evidence proof tending to establish such promise.
7. **Evidence: COMPETENCY.** The purport of certain letters, set forth in the opinion, held to afford no evidence of ratification of such a promise.
8. **Trial: QUESTION FOR JURY: OBSTRUCTION OF WATERCOURSE.** Where the main point of contention is whether the damming of the flood-waters was caused by the defendant negligently permitting the trestle to become obstructed, or whether the filling in of the trestle was owing to natural causes, and the evidence is conflicting, this question of fact should be submitted to a jury for its determination.

APPEAL from the district court for Dakota county:
GUY T. GRAVES, JUDGE. *Reversed.*

C. C. Wright, B. T. White, B. H. Dunham and Herman Aye, for appellant.

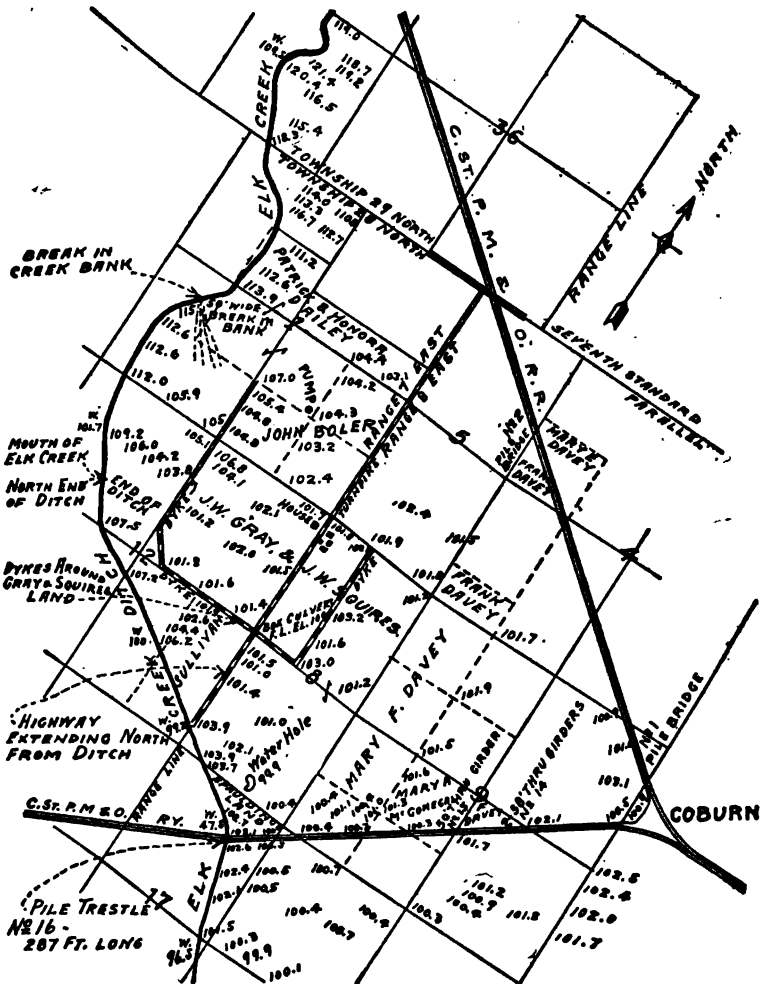
R. E. Evans and Shull, Farnsworth & Sammis, contra.

LETTON, J.

This is an action to recover for flood damages to crops in the years 1907 and 1908. The petition, much condensed, alleges that the defendant's railway crosses a running stream, known as "Elk Creek," near plaintiffs' land; that prior to 1885 Elk Creek in that vicinity spread out forming a marsh, and finally draining into the Missouri river; that the drainage of the flood-waters was through and over the marsh; that in 1885 the railway was constructed across the marsh and a trestle about 160 rods long built for the passage of the flood-waters of Elk

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Creek, and that the natural flow of these waters was under this trestle; that in 1886 a drainage district was organized and a ditch constructed from Elk Creek through the marsh



and under the trestle for the purpose of draining the ordinary waters of the marsh, but not for the purpose of draining the flood-waters; that afterwards the defendant filled the trestle, leaving about 284 feet, and by so doing negligently failed to leave sufficient openings in the em-

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bankment to carry off the flood-waters; that the piling and the trestle were not placed at right angles with the flood-waters, but in a diagonal direction with reference thereto; that a large amount of weeds and debris accumulated around the trestle and dammed the waters, and thereby caused a deposit of debris and sediment which gradually filled the opening under the trestle. It is further alleged that after the ditch was made it became the natural channel of Elk Creek, and that for more than ten years before the matters complained of the flood-waters flowed through the trestle; that the defendant fastened to the trestle two or more strands of barbed wire, by which flood matter coming down the stream choked the channel, filled it with sediment and caused the water to back up and flood the plaintiffs' lands; that there was for many years a space of more than 6 feet between the ground and the stringers of the trestle, but that defendant negligently allowed the space to be filled up to within about 15 inches of the bottom of the stringers; that defendant, in 1906 and 1907, dug a ditch on the northwest side of the trestle in its right of way, and threw the dirt from the excavation out and under the trestle, raising the accumulation of dirt about 18 inches; that before these wrongful acts the flood-waters sometimes overflowed plaintiffs' land, but passed off within a few hours; but that by the filling of the trestle the usual flow of the flood-waters has been cut off, and in case of unusual floods the waters are dammed and held on plaintiffs' land, whereby their crops have been destroyed.

The answer denies negligence and that defendant shortened the trestle; alleges that plaintiffs' land was a swamp when the railroad was built, without watercourse or drain; alleges that Dakota county constructed the drainage ditch, and it was the duty of the county to maintain it and keep it clear; that the injuries received were due to the construction and maintenance of the ditch and to dikes built by plaintiffs around their land which changed the flow of water over the same. It is also alleged that the situation was well known to the plaintiffs before the

crops were planted. The reply alleged that the trestle was originally constructed a half mile in length and was afterwards filled in. During the trial an amendment to the reply was permitted, pleading that in 1906 the defendant agreed, through its agent, C. P. Hill, with the plaintiffs that it would replace a portion of the wooden trestle with a steel span about 60 feet long, and drain the plaintiffs' land, and that the plaintiffs relied upon this agreement in planting their crops in 1907 and 1908.

The evidence consists of about 1,200 pages of typewriting, besides maps, profiles and other exhibits. The court gave 48 instructions. There are 145 assignments of error. It is impossible to do more than mention a few of these, or to give more than a general statement of the evidence.

The line of defendant's railway crosses what is known as "Big Marsh" in Dakota county, which is situated on what is commonly called the "Missouri river bottoms." Elk Creek, which is a stream about 40 miles long, flows in a southeasterly direction through the higher lands to the north and west, and when the railway was built discharged its waters upon the surface of the bottom lands at a point near the southwest corner of plaintiffs' lands. The Elk Creek ditch, which was dug in 1886, began where the creek debouched upon the bottom lands, and after its excavation the waters which formerly were discharged on the surface of the lower lands, thus creating the swamp, were kept within its banks and carried southward under the trestle into a creek. The ditch bottom being lower than the adjoining land, the surface waters drained into it, and for a number of years after it was in operation it successfully drained the land of plaintiffs and others lying in the swamp. At the trial it was admitted by the plaintiffs that the trestle was originally 270 feet long, and that in 1907 it was 283 feet in length, so that it was slightly longer at the time the damage occurred than it was when originally constructed. By this admission the charge of negligence in shortening the trestle was disposed of. These further facts seem established: That in 1885 there

was no defined channel under the trestle, but merely a portion of the swamp, the waters slowly draining southward, and that at that time plaintiffs' lands were marshy and unfit for cultivation, the same as most other land in the vicinity; that plaintiffs suffered loss of crops substantially as alleged; that their lands for a long time after the construction of the railway embankment and ditch, when flooded, drained to the south and east and through and under the trestle, and that the trestle gradually became nearly filled with earth and silt, except where the ditch passed under.

The main point in controversy, and that upon which the decision as to the rights or liabilities of the respective parties must eventually in great measure rest, is whether or not the sediment which caused the partial filling of the trestle was deposited as the natural consequence of the slackening of the current of Elk Creek when it flowed from the higher lands into the ditch and the deposit under a well-known natural law of the matter held in suspension during its more rapid flow, or whether such filling was caused by the negligence of defendant.

An examination of the maps and plats in evidence and the testimony of the engineers shows that the same phenomena have occurred with reference to the banks of the ditch as are apparent on the banks of natural streams under similar conditions. Where a stream which is heavily loaded with silt overflows its banks, the solid material held in suspension, when the rapidity of the current is slackened, tends to settle and be deposited. As a natural result it is almost invariable in Nebraska that the land near the channel on each side of a stream flowing through an alluvial plain is slightly higher in elevation than that which lies farther from the stream. We are probably entitled to take judicial notice of this fact, but, whether we are or not, the testimony found in this record establishes it. The accompanying plat shows that at a point upon the half section line west of plaintiffs' lands where it intersects the ditch the elevation is 107.5,

gradually lowering to the eastward to about 101.3 on plaintiffs' lands, and that all along the line of the ditch to some distance south of the trestle the banks of the ditch are higher and gradually slope away to the nearly level surface lying to the eastward. At a distance of about 600 feet below the trestle the elevation is 102.4 at the ditch bank and 100.5 to the east of it, and 1,200 feet below it is 101.5 at the bank and 100.3 at a point to the east a short distance.

The defendant contends that the waters were surface waters, as to which it owed no duty to plaintiffs; that silt was deposited all along the course of the ditch above and below the trestle by natural causes; that the resulting elevation of lands belonging to private parties lying between the right of way and the plaintiffs' lands prevented the waters reaching the trestle, and consequently that the keeping open of the trestle would have had no effect.

At the trial the plaintiffs seem to have abandoned the theory that the original construction of the railroad embankment and trestle was negligent, and the contention that the trestle has been shortened; in fact, it is said in their brief: "It is not claimed by the plaintiffs that their damages resulted primarily by reason of the construction of a permanent railroad grade to the north and east of the trestle in question. It is probably true that the trestle itself, when free from obstruction, was amply sufficient to provide an outlet for all waters that might come down from above, and the chief complaint of plaintiffs is with relation to the filling in of said trestle and of the right of way immediately adjacent thereto. The point that we make and insist upon is that the obstructions to the flow of the flood-waters from plaintiffs' land existed upon the right of way of the defendant company, and that they arose by reason of the defendant's negligence in permitting the filling up of the trestle with dirt and debris, and that the maintenance of the ditch by the county, whether proper or improper, did not cause the water to be dammed up and held on plaintiff's land with-

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out opportunity to flow therefrom in the natural and ordinary way and direction. Also, the defendant was not relieved of the duty of preventing the obstruction to the flow of the water over and across its right of way, even though the county did not properly maintain the ditch, or even though the obstructions formed at or near the ditch at the point where it crossed the right of way."

The court evidently did not take the same view of the issues as the plaintiffs assert in this court. It gave to the jury, in defining the issues, the allegations of the petition at great length, including the charge of negligence in shortening the trestle, which had been eliminated, and further instructed them that "the gist of this action is the charge of negligence and the want of proper care on the part of the defendant in the construction of its trestle bridge across Elk Creek and the openings in the embankment east thereof across what is called 'Big Marsh,' " and that, to entitle plaintiffs to recover, "it must further appear from the evidence that such overflow was directly and naturally caused by the negligent and improper construction of the defendant's trestle bridge and embankment."

Instructions Nos. 7, 9 and 10, which are assigned as erroneous, were based upon this theory of the case. By instruction No. 7 the jury were told that "it was the duty of defendant to so construct the trestle bridge over Elk Creek and to provide openings in the embankment east thereof as to permit the passage in the channel of the creek of such quantities of water as might reasonably be expected or anticipated in ordinary years." The ninth instruction embodies the same idea in greater detail. By the tenth instruction the jury were told that if the defendant constructed such a trestle and embankment, as stated and defined in the preceding instructions, then it would not be guilty of negligence and would not be liable, and that, "on the other hand, if the jury from the evidence believe that the defendant failed to exercise and employ such reasonable and proper care and skill, as stated and

defined in said last preceding instruction, in the construction of said trestle bridge and embankment, and that the overflow on the plaintiffs' land was the direct and natural result of such failure, and that the plaintiffs suffered damages in consequence thereof, then the defendant would be liable in this case for only such damages as were caused by its negligence in backing up said floodwaters and holding the same on crops of plaintiffs." This portion of the charge must have tended to divert the attention of the jury from the questions that were really involved in the case. The facts hereinbefore stated show that they were not applicable to the evidence, and that the jury were thus permitted to base a verdict against the defendant upon facts suggested and implied by the instructions, but not proved by any evidence. These instructions also seem to be inconsistent with others given. That this is the case is not seriously disputed by plaintiffs' counsel, but, say they, the inconsistency was produced by the court giving other instructions stating the law more favorably to the defendant than the facts warranted.

In such a case as this it is a difficult matter for a trial court to state clearly the real issues. Many of the allegations of the petition were not sustained by the evidence, and it was unnecessarily lengthy and involved, so that the task for the court was needlessly harder than it would have been if the pleadings had truly reflected the real issues. In such a case the trial court would be justified in taking all the time necessary, even to the suspending of the trial, to give an opportunity to prepare instructions clearly presenting the true and actual issues to the jury. We believe the instructions given, predicated on the contention that the original construction of the railroad and trestle was negligent, and permitting the jury to consider and return a verdict on such an issue, were prejudicially erroneous to the defendant, as outside of the true issues, confusing and misleading in their tendency. This is more especially so in such a case as this where the question of

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liability rests upon such a narrow margin. There was no negligence in the construction of the railroad or trestle in 1879, and the evidence shows that for more than 20 years after the trestle was constructed overflows of Elk Creek and of the ditch were infrequent, that flood-waters were rapidly discharged from the lands of the plaintiffs and others, and that it was only after the bed and banks of the ditch had been raised by the deposit of silt, and after a period or cycle of dry years had given place to a series of years in which rainfall was more abundant, that trouble ensued. It was after a heavy flood in 1906, which brought down much sediment by erosion from the higher lands, that the injuries complained of occurred.

Since there must be a new trial for the giving of the instructions referred to and other errors, we deem it wise to indicate our view upon some of the matters of law in dispute. By instructions given at the request of defendant, the jury were told in substance that the undisputed evidence shows that the county constructed the Elk Creek ditch and changed the course of the waters and increased the volume of the same at the place where the ditch flows under the railroad, and that it is not the duty of the defendant to maintain the ditch, but the duty of the county to maintain the ditch and keep the same free from obstructions across the right of way; "that the defendant company cannot be held liable in this case on account of obstructions in the channel of the Elk Creek ditch, for the reason that there is no duty in the law on the defendant to keep said ditch free from obstructions, and the defendant company could only be made liable in case it wilfully placed obstructions in the channel of said ditch in such a manner as to obstruct the free flow of the water therein and cause the water to overflow its banks." By other instructions the jury were told "that the defendant is not liable on account of any fill under its trestle which was caused by the natural overflow of the Elk Creek ditch;" and, further, that, "if such flood waters caused a deposit of silt and sediment under the railway trestle in question

by the natural operation of said stream, and during the years past caused said trestle to be filled on account of such deposit to such an extent as to destroy the drainage of plaintiffs' land, then the defendant company cannot be held liable therefor in this action."

Do these latter instructions state the law correctly? Was the defendant under any duty, after the ditch was dug and these flood-waters concentrated at and above the trestle, to keep the trestle free from obstructions? If the ditch had been a natural watercourse it would have been its duty to keep and maintain a passageway for the waters which might reasonably be anticipated to flow therein, both while in the channel and while in flood. When Elk Creek was in fact extended under the trestle, did the same duty attach? This was a county ditch, established under the drainage statutes, and, if any additional duties or obligations were imposed upon the defendant by its construction, they were presumably taken into account in estimating benefits or damages when the proceedings to establish the ditch were had. The new channel had been in use for nearly 20 years in 1906. While we believe it to be the duty of the county to keep the channel of the ditch clear, we are also of the opinion that the change in the channel imposed the liability on the defendant to keep its trestle unobstructed to the same extent as if it were a natural stream at that point. Of course; this does not mean that defendant must clear away a general deposit of sediment above the trestle, unless the deposit is caused by a negligent failure to maintain a proper passageway thereunder for the loaded waters; for, if the deposit would have taken place even if the lands had been in their natural state unencumbered by the railway and trestle, the defendant is clearly not responsible for the silting, and not liable for any damages caused thereby. A number of the instructions given at the request of the defendant are inconsistent with this view of the law, and should not be given on a new trial.

As to the measure of damages: If the deposit was oc-

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caused by the negligence of the defendant in allowing the trestle to be obstructed, and could have been prevented by keeping it open to the extent its duty required, then we think that each failure to allow the flood-waters to pass constituted a nuisance, and each recurring damage to the crops thereby furnished a new cause of action. *Chicago, B. & Q. R. Co. v. Emmert*, 53 Neb. 237; *Chicago, R. I. & P. R. Co. v. Andreesen*, 62 Neb. 456; *Chicago, B. & Q. R. Co. v. Mitchell*, 74 Neb. 563; *Morse v. Chicago, B. & Q. R. Co.*, 81 Neb. 745; *Reed v. Chicago, B. & Q. R. Co.*, 86 Neb. 54. Unless the filling of the Spalding land lying between the outlet and plaintiffs' lands was occasioned by obstructions negligently permitted to remain at the trestle, defendant is not liable either for damages to the crop or damages to the land; but, if the Spalding land was filled as a result of negligent obstructions to the waterway, then we think the rule stated in the foregoing cases applies.

Defendant also complains that the plaintiffs were permitted to amend their reply so as to allege an agreement by one Hill, defendant's claim agent, made in 1906, after the flood of that year, that the defendant would promptly replace a portion of the trestle with a steel span about 60 feet long, and would ditch and otherwise prepare the land north of the trestle so as to properly drain the plaintiffs' lands, and that in planting the crops in 1907 and 1908 they relied upon this agreement. This amendment was intended as a defense to the allegations of the answer that when these crops were planted the plaintiffs knew the condition of affairs and took the risk. The testimony of Mr. Gray substantially corresponds with this allegation, although the promise is denied by Mr. Hill. We believe the testimony as to the promise to open the waterway and ditches so as to drain the land was connected with the subject with which Hill was authorized to deal, and was properly admissible as excusing the plaintiffs for planting the crops as conditions then existed, and, of course, in proving this the whole statement was narrated. It was

really immaterial whether a new steel span was to be put in or not; the controversy is as to whether there was a promise to open the waterway so as to justify the planting of crops.

In this connection certain correspondence was received over defendant's objection, ostensibly for the purpose of showing a ratification by the defendant of the alleged promise by its agent Hill to erect a new steel span. Exhibit 35 is a letter from Gray to the claim agent describing the flood, making a claim for damages and giving his idea of the cause. It makes no reference to any agreement for a new bridge. Exhibits 36, 37 and 38 merely acknowledge the receipt of the letters by Gray. Exhibit 40 promises an investigation, and says: "If we find that any of this damage is due to lack of waterway, the necessary steps will be taken to remedy the trouble." The remaining letters throw no further light upon the agreement and ratification than do those mentioned. We cannot see that they afford evidence of ratification of the alleged promise made by Hill, and think they should not have been admitted in evidence.

Defendant insists that the evidence of the engineers produced by it as witnesses and also the elevations shown on the various plats introduced by both plaintiffs and defendant conclusively established that obstructions of the trestle were not the proximate cause of the injuries, and that the court should have directed a verdict in its favor. We find, however, testimony on behalf of plaintiffs to the contrary by the witness Johnson, who also is an engineer, and by other witnesses. While we might have taken a different idea had we tried the question, we believe there is sufficient evidence to warrant the submission of the real issues to a jury. If a new trial is had, the issues should be narrowed and clearly presented both in the pleadings and instructions. We feel it our duty to repeat what has frequently been said by this court, that instructions should reflect the real issues, and that if the evidence clearly fails to sustain an issue, or if either party virtually abandons

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one or more of the contentions on which he relies, that issue, or that contention, should not be submitted, even though it is made in the pleadings; that the charge should be as brief, clear and connected as may be and at the same time fully and fairly submit the true issues involved, without undue repetition, since it is difficult enough at the best for one unused to the technical phraseology of the law to clearly grasp the meaning of stiff and formal written instructions.

What has been said with reference to the main question being whether or not obstructions to the flow of water through the trestle negligently made caused the damage is not intended to mean that other questions involved which we have not mentioned may not properly be issues in the case. It is impossible, with due regard to the right of other litigants, to extend this opinion so far as to cover every point involved.

The judgment of the district court is reversed and the cause remanded.

REVERSED.

IDA L. HAAS, APPELLANT, v. MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK, APPELLEE.

FILED FEBRUARY 29, 1912. No. 17,227.

1. **Process: SUMMONS: AMENDMENT.** A petition was filed against "Mutual Life Insurance Company of New York"; the summons and return thereto named the party defendant in like manner. The proper name of defendant is "The Mutual Life Insurance Company of New York." The summons was served upon the managing agent of defendant. Defendant made a special appearance objecting to the jurisdiction. Before the objections were submitted the plaintiff filed motions to amend the petition, summons, and return by correcting the name of defendant. These motions were sustained. The plea to the jurisdiction was then overruled. The summons was served before the bar of the statute of limitations had fallen; the amendment was made thereafter. *Held*, That it was not erroneous to allow the amendment to be made, and that it related back to the date of the service of the summons upon the proper person.

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2. **Judgment: RES JUDICATA.** A general demurrer to a petition was sustained in the circuit court of the United States and the plaintiff given leave to amend; an amended petition was then filed containing additional allegations; a general demurrer was filed to this petition, but while the demurrer was pending, and before submission, the action was dismissed at the plaintiff's request. The petition in this case is substantially identical with the latter petition in the federal court. *Held*, That the ruling upon the demurrer to the first petition and the judgment of voluntary dismissal do not establish the defense of former adjudication.
3. **Insurance: CONTRACT: PLACE OF CONTRACT: LAWS GOVERNING.** Where a resident of Nebraska, who then owned a paid-up policy of insurance in the defendant company, made an application at his home in this state for a new policy to an agent of the defendant who was authorized to transact business for it in this state, and submitted to a medical examination, and delivered to the agent here his paid-up policy with a paper authorizing and directing the company to apply from the surrender value of the former policy the amount of the first two premiums, and pay the remainder to him in cash, and afterwards, without any communication between the applicant and the home office, the agent in this state delivered the new policy and a check for the balance due on the surrender value, the contract was completed in Nebraska, and is to be governed by the laws of this state, and not by those of the state of New York where the home office of the defendant is.
4. ———: ———: **ABANDONMENT OF CONTRACT: QUESTION FOR JURY.** Whether or not the insurance contract was abandoned is a question of fact for the jury to determine.
5. ———: **CONSTRUCTION OF POLICY: FORFEITURE.** When the insured died, the insurer had in its possession an accumulated reserve on his policy sufficient to pay the premiums upon the policies for more than three years and until after his death. There being no forfeiture clause in the policy, *held* that the insurance was in force at the time of his death, unless the policies were abandoned.
6. ———: ———: **INCONTESTABILITY.** The incontestable clause of the policies sued upon does not apply to the defense of lapse or forfeiture by nonpayment of premiums, or to the defense of abandonment of the contract.
7. ———: ———: **RIGHTS OF INSURED.** There being no forfeiture clause in the policy, its provisions allowing options to the insured of taking a paid-up policy, etc., on default of payment of premium on the day fixed, did not bind the insured to exercise the options,

and he had the right to rely upon the main and not upon the ancillary or subordinate stipulations, if it seemed best to him so to do.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Reversed.*

Charles S. Elgutter and Joel W. West, for appellant.

*Montgomery, Hall & Young and Frederick L. Allen,
contra.*

LETTON, J.

On a previous appeal, opinion reported in 84 Neb. 682, it was determined that a general demurrer to the petition had been erroneously sustained by the district court, and its judgment was reversed and the cause remanded for further proceedings.

The point determined on the former appeal was in substance that, if a policy of life insurance contains no provision for a forfeiture by reason of the failure of the insured to pay subsequent premiums *ad diem*, a failure to pay such premiums on the day named will not of itself forfeit such policy.

On being remanded, issues were made up in the district court, the cause tried, a verdict directed for the defendant, and from a judgment of dismissal plaintiff appeals.

Omitting some unimportant matters, the answer pleads the statute of limitations, former adjudication, and abandonment of the contract by the insured in his lifetime, and further alleges, as the fifth defense, that the policies sued upon are New York contracts and are governed by the laws of that state; that the defendant gave notice to the insured as provided by the statutes of that state of the falling due of the several premiums, and that the notices so given stated that, "unless the payment so due shall be paid to this company by or before the said day, the policy and all payments thereon will become forfeited and void, except as to the right to a surrender value or paid-up

policy as provided by statute." It is then alleged that the premiums were not paid, and that under the laws of New York such failure to pay the premiums caused the policies and each of them to lapse and to become of no effect, except as otherwise provided in the policies; that Haas knew of such result and accepted the policies accordingly. It was further alleged, referring to the clauses in the policy referring to paid-up policy, options, etc., that under sections 88 and 90, laws of New York, 1892, a failure to pay any premium after the third premium would cause the policies to lapse, except for the purpose of obtaining substitute contracts, and that by the laws of New York the rights of delinquent policy holders are limited to those mentioned in section 88. It is also alleged that Haas never requested either a paid-up policy or other optional contract, and that none was issued to him, and that by reason of these laws and the failure of Haas to pay the premium or exercise his options the policies lapsed and became void long before the death of the insured.

The reply consists of general denials; a plea as to the allegations that the contract was a New York contract, that this is no defense on account of failure to give notice as the New York statutes require; and in substance that the contracts were made in Nebraska and are Nebraska contracts.

After the evidence of both parties had been adduced, the district court instructed the jury that the plaintiff was not entitled to recover "on the ground that the policies were forfeited for nonpayment of premiums and notice of forfeiture duly given during the lifetime of Andrew Haas." A number of errors are assigned in the motion for a new trial and in the briefs, but we think it unnecessary to consider them in the order of assignment.

The third defense pleaded is that the action is barred by the statute of limitations. The original petition was filed on the 23d day of April, 1907, against "Mutual Life Insurance Company of New York." The true name of the defendant is "*The Mutual Life Insurance Company of*

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New York." The summons and return showed service upon the proper agent of the defendant under the wrong name. Defendant made a special appearance objecting to the jurisdiction, and on June 13, 1907, and before the objections were submitted, the plaintiff filed motions to amend the petition, summons, and return by correcting the name of defendant. These motions were sustained, and the plea to the jurisdiction was overruled. The insured died on the 1st day of May, 1902, so that if the original summons which was served on April 27, 1907, was sufficient to bring it into court, the action was begun within the five-year limitation. Section 144 of the code provides: "The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process, or proceeding by adding or striking out the name of any party or by correcting a mistake in the name of a party, or a mistake in any other respect." The omission of the article "the" in defendant's name cannot be regarded as fatal when the summons was served on the proper person. The defendant was apprised of the action, and, the summons being served before the bar of the statute fell, the amendment related back and the action was begun in time. Amendatory statutes would be of little use if they could not be applied under such circumstances.

As to the fourth defense: An action was begun on these policies in the circuit court of the United States for this district. A demurrer to an amended petition was filed and sustained. By leave of court a second amended petition was filed, which is identical with the petition in this case. A general demurrer was filed to this petition, but before it was submitted or considered by the court the action was dismissed by the plaintiff. Defendant contends that the second amended petition differed in no essential respect from the first, to which the demurrer was sustained, and, hence, that the order of the court sustaining this demurrer and providing "the plaintiff is granted ten days in which to file amended petition, other-

wise judgment will be entered dismissing said action at the cost of the plaintiff," and the dismissal, was a final adjudication. We cannot take this view. When the second amended petition was filed, if it had been identical in substance with the first, it should have been stricken from the files at defendant's instance. Two additional paragraphs had been added, however, which defendant now insists did not change the legal effect. The federal court and the defendant itself evidently took the second amended petition as *prima facie* evidencing a change in the material facts alleged, or the case would not have been dismissed with an issue of law pending. To hold as defendant urges would require this court to pass upon the question whether that court was right in treating the second petition as being different from the first, and in allowing the case to be dismissed at the plaintiff's request with that question undetermined. This we are not inclined to do.

The fifth defense is based upon the proposition that the policies issued are New York contracts, and that under their provisions and the laws of that state they were forfeited during the lifetime of the insured. The facts relied upon to establish this defense are as follows: At the time applications were made for the two policies Haas was the owner of two paid-up policies for \$1,500 each issued by the defendant. One of these policies at this time had a cash surrender value of \$522.18. On July 9, 1896, one H. S. Winston, an agent of the defendant, who was a neighbor and friend of the insured, procured from Haas in Omaha an application for a new policy for the sum of \$5,500, under an agreement that he should surrender the paid-up policy, that from the cash surrender value two premiums on the new policy should be paid, and the remainder of the surrender value paid in cash. At the same time Mr. and Mrs. Haas executed and delivered to the agent a paper entitled "Conversion Receipt," which acknowledged the receipt from the defendant of \$522.18 by them, in full payment of the value of policy No. 677,819

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now surrendered to the company for the purpose of converting the policy into another for \$5,500, and providing that two of the yearly premiums were to be paid out of the surrender consideration, the remainder, if any, to be paid in cash. This paper was not dated when it was signed, though a blank space was provided for that purpose, but after the application had been approved the date of August 18, 1896, was inserted in the blank space at the company's office in New York. The application, conversion receipt, and old policy were delivered to the agent in Omaha, and Haas took the medical examination there.

The evidence shows that the defendant had appointed a general agent for Iowa and Nebraska, Mr. R. J. Fleming of Des Moines, and that the defendant's business for these states was conducted by himself and brother under the firm name of "Fleming Brothers, Managers." This firm maintained offices in Des Moines and in Omaha, and "Fleming Brothers, Managers" had the general control and management of the business of the defendant in the states named. Soliciting agents were also appointed by the defendant, who were under the direction of Fleming Brothers. Both Fleming Brothers and the soliciting agent, Winston, were authorized to transact business for the defendant company in Nebraska by the state auditor, under the provisions of section 6513, Ann. St. 1911. Winston acted under the immediate direction of Fleming Brothers, Managers. The application and other papers were sent to the home office in New York by the agents, where it was accepted and the new policy No. 775,291 made out. A statement of account was made up and a check drawn for \$141.48, which amount, together with the two premiums agreed to be paid, made up the surrender value of the old policy. The policy and check were then sent by mail to Fleming Brothers, Managers, for delivery. The papers were given by them to Winston, the agent, in Omaha. The check, after being indorsed, was cashed by Haas at an Omaha bank, and the policy was found among Haas' papers in

his office in South Omaha after his death. Haas was not in the state of New York in 1896. The second policy was obtained in like manner, except that it was at a later date in the same year. The policies bear stamped on the back: "Any change in address notify Fleming Bros., Managers, Des Moines, Iowa."

Was this contract entered into in New York or in Nebraska? No communication was ever had by mail or otherwise, so far as the evidence shows, between Haas and the defendant at its home office in New York. The agent Winston took the application, received the old policy and the conversion receipt in Omaha, and, after the papers were given to him by Fleming Brothers, there delivered the new policy and the check to Mr. Haas. The defendant places much stress upon a clause in the application that the statements therein made "are offered to the company as a consideration of the contract which I hereby agree to accept, and which shall not take effect until the first premium shall have been paid * * * and the policy shall have been signed by the secretary of the company." It argues that the contract became binding and complete upon the company accepting surrender of the old policy, the secretary signing the new one in New York and mailing it to its agent for delivery, for the reason that the last act necessary to the validity of the contract was the conversion to its own use from the surrender value of the old policy of the amount of the first two premiums upon the new. While the liability of the company might perhaps attach under some circumstances even if the policy were never delivered (*Cooper v. Pacific Mutual Life Ins. Co.*, 7 Nev. 117; *Fried v. Royal Ins. Co.*, 50 N. Y. 243), the fact of liability does not always control and determine the question as to the locality of the contract. Other circumstances may enter as factors in the determination of this. The transaction with the agent was not a contract for the new insurance alone. It was for the payment of the surrender value of the old policy as well. This part of the transaction was not completed until the delivery of the

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new policy evidencing the application of a part of this value as premium on a new policy, and the payment of the remainder due on the surrender value of the old. These acts were all performed in Nebraska. The defendant is not entitled to sever the transaction and to say that, because a portion of the agreement was carried out in New York, that portion of it which constituted a new insurance contract controlled and governed the legal status of the whole transaction. Moreover, in this contract, as in every other contract, there must be a proposal and an acceptance, and that acceptance communicated to the person who proposed the contract or to some one acting for him and in his behalf. The evidence shows that Haas made the proposal, but that he had no notice or knowledge of its acceptance until the delivery of the policy. The only person with whom he dealt in the transaction was Winston. It was through him he made the proposal, and it was through him he acquired knowledge of the acceptance. If the policy had been sent direct to him by mail, thus evidencing the intention of the insurance company to part with its dominion or right of recall over it, the acceptance would probably be deemed complete, and the constructive notice of such acceptance given by its deposit in the mails would be sufficient. But this is not the case here.

In *Horton v. New York Life Ins. Co.*, 151 Mo. 604, 52 S. W. 356, the insured was a resident of Missouri. His application for the policy was made in Missouri to the local agent of defendant, accompanied by a note for premiums, and was forwarded by the agent to the home office in the city of New York. Upon the issuance of the policy it was forwarded through defendant's St. Louis office to the local agent for delivery in Missouri. In that case, as in the one at bar, it was contended that, since the premium accompanied the application and a receipt was given which made the contract binding when the application was accepted in New York, the acceptance of the application completed the contract without the actual de-

livery of the policy into the hands of the insured, and that, acceptance having taken place in New York, the transaction was a New York contract.

The conditional receipt referred to provided that the payment of the first two premiums was received "upon condition that, should the said application not be accepted by the New York Life Insurance Company, said note shall be returned upon surrender of this receipt; but, should the risk be accepted, the said insurance shall be in force from this date." After stating the law with regard to the making of contracts by mail, to the effect that where one makes a proposition by mail he thus invites response by mail and makes the mails his agent, the court said: "This does not change the rule of law that an acceptance to be binding must be communicated to the proposer; it only makes the deposit of the letter of acceptance in the mail, under those circumstances, constructive notice to him who made the proposal that his offer has been accepted. Until there is an actual or constructive notice to the other party of the acceptance it is still in the breast of the acceptor and may be revoked before it becomes binding. *Bruner v. Wheaton*, 46 Mo. 363; *Lungstrass v. German Ins. Co.*, 48 Mo. 201. Actual delivery of the policy was not essential to the consummation of the contract, if the company had chosen to signify to the insured by other means that his application was accepted. But the company did not choose to do so; the first intimation that the insured had that his application was accepted was the delivery to him of the policy. When the company resolved to accept the application it kept that resolution within its own breast, and took the precaution to send the policy to its own agent in Missouri to be delivered on condition of payment of the first premium, and withheld from the insured notice of its acceptance. This was simply a resolution within itself, with no outward indication, and within its own power to reconsider and change." The court pointed out that it was within the power of the company to recall the policy at any time while it was yet in the

hands of its own agent, and, while it did not base its decision upon this point alone, it was held that the contract was not complete until the policy was delivered, and, therefore, it was a Missouri contract.

In *Wall v. Equitable Life Assurance Society*, 32 Fed. 273, opinion by Brewer, J., the facts were that the defendant was a New York corporation doing business in the state of Missouri. The insured made his application in that state, which was forwarded to New York. The application was accepted in New York and sent to Missouri for delivery to the applicant there. By the terms of the policy the premiums were payable in New York, and, if the sum insured became payable, the payment was to be made in New York. This was held to be a Missouri contract. In the same case which was taken on error to the supreme court of the United States (*Equitable Life Assurance Society v. Clements*, 140 U. S. 226; *Equitable Life Assurance Society v. Pettus*, 11 Sup. Ct. Rep. 822), the opinion recites that it was alleged, and not denied, that the first and two later premiums were paid in Missouri, and it was implied in the pleadings that the policy was delivered by the company's agent in Missouri. The court say: "There is no evidence whatever, or even averment, that the policy was transmitted by mail directly to Wall, or that the company signified to Wall its acceptance of his application in any other way than by the delivery of the policy to him in Missouri." It was held it was a Missouri contract.

Perry v. Dwelling-House Ins. Co., 67 N. H. 291, 33 Atl. 731. In this case it is said: "Upon these facts the contract was made, and concluded by the delivery and acceptance of the policy—not because of its delivery, but because until that moment the plaintiff had no notice of the acceptance of his application. Prior to that time the plaintiff was at liberty to revoke his application, and the defendants to withdraw their acceptance and countermand their instructions for the delivery of the policy. A proposition does not become a contract until the maker or his

agent is notified of its acceptance. *Beckwith v. Cheever*, 21 N. H. 41; *Stebbins v. Lancashire Ins. Co.*, 60 N. H. 65, 70; *Dickinson v. Dodds*, 2 Ch. Div. (Eng.) 463."

Expressman's Mutual Benefit Ass'n v. Hurlock, 91 Md. 585. This was a policy of fire insurance, and, while there may be a difference between policies of life and fire insurance in this respect, the principle as to acceptance applies. See *Heiman v. Phoenix Mutual Life Ins. Co.*, 17 Minn. 153 (127).

The general rule is that the state where the application is made and where the premium is paid and the policy delivered is that where the contract is entered into. *Mutual Life Ins. Co. v. Cohen*, 179 U. S. 262; *New York Life Ins. Co. v. Russell*, 77 Fed. 94; *Albro v. Manhattan Life Ins. Co.*, 119 Fed. 629; *Millard v. Brayton*, 177 Mass. 533; *Swing v. Wellington*, 44 Ind. App. 455; *Berry v. Knights Templar & M. L. I. Co.*, 46 Fed. 439; *Knights Templar & M. L. I. Co. v. Berry*, 50 Fed. 511; *Dolan v. Mutual Reserve Fund Life Ass'n*, 173 Mass. 197; *Equitable Life Assurance Society v. Winning*, 58 Fed. 541; *Fletcher v. New York Life Ins. Co.*, 13 Fed. 526; *Roberts v. Winton*, 100 Tenn. 484, 41 L. R. A. 275; *Cowen v. Equitable Life Assurance Society*, 37 Tex. Civ. App. 430, 84 S. W. 404; 1 Cooley, Briefs on Law of Insurance, 564. See exhaustive note to *Johnson v. Mutual Life Ins. Co.*, 63 L. R. A. 833 (180 Mass. 407). Haas was not bound to accept the policy or the check if the policy did not comply with his application. The insured has a right to inspect the policy to see whether it conforms in its stipulations to the terms proposed in the preliminary negotiations. If the policy conforms to the application, the contract becomes complete on delivery, but, if not, then it constitutes a mere counter proposition. 1 Cooley, Briefs on Law of Insurance, 457, 458.

The agreement in the policy that the first premium "shall be paid in advance on the delivery of this policy" requires action by both parties to the contract, payment of the premium by the insured and delivery of

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the policy by the insurer, so that it is clear that the intention of both parties as to the ordinary method of paying by money or check was that the last act in the contract should be the delivery of the policy. In *McElroy v. Metropolitan Life Ins. Co.*, 84 Neb. 866, it is said: "Where the parties to an insurance contract are in different jurisdictions, the place where the last act is done which is necessary to the validity of the contract is the place where the contract is entered into." We think that the delivery of the conversion receipt, which was in effect an order to apply the money in its hands to the payment of the premiums, was equivalent to payment, so far as the locality of the transaction is concerned, and, the final act of delivery being made here, brings the case within the rule of the cases cited.

At the trial plaintiff offered in evidence certain rules and regulations governing the manner of transacting the business by the defendant's general and local agents. These rules provided that a policy, when sent to an agent for delivery, should not be delivered until the first premium was paid, and unless defendant was in good health and his occupation unchanged, and, further, that at the time of delivery the agent shall take a receipt from the insured reciting that the policy is the one for which he applied and that he has accepted the same. The introduction of these rules in evidence was objected to by the defendant, the objection sustained by the trial court, and this ruling is assigned as error.

The evidence of the assistant actuary of the defendant was taken by deposition. He testified that, when the policies were sent to the general agent who had charge of the territory, he was authorized to accept the first premium and to deliver the policy to the insured, provided that the insured was in good health at that time. The witness also testified that, when the policy was sent to the general agent through whom the application came, the agent would not have authority to deliver the policy if he knew that the applicant was not in good health, unless

the company had issued to him a binding receipt. Objections were made by defendant to the introduction of the printed rules and of all this line of testimony, as being incompetent, irrelevant, and immaterial, and seeking to modify the written contract. These objections were sustained and the evidence excluded.' This is complained of by plaintiff. In the view we have taken of the facts in evidence, we think it hardly necessary to determine whether or not the exclusion of this evidence was erroneous. It could throw light on what the purpose of defendant was in sending the policy to its agent for delivery instead of to the insured, and its admission, we are inclined to think, would not have been improper, but we do not so decide.

Haas died from the result of an accident on May 1, 1902. He had paid the premiums due on one policy up to December, 1899, and to July, 1900, on the other, but failed to pay the subsequent premiums. The plaintiff proved that at the time of the defaults the reserve accumulated on policy No. 775,891 was \$323.29, and on No. 803,280 \$238.18, which, in the case of No. 775,891, would have carried it for its full amount between four and five years, and, in case of policy No. 803,280, would have carried that policy between three and four years, and until after the death of the insured; so that there was more than enough money in the defendant's hands to have kept these policies in force until after after the death of Haas, unless a forfeiture had taken place.

We have already decided in this case that the policies contained no forfeiture clause, and there is no competent evidence in this record to show that a forfeiture was ever attempted to be made or declared in the lifetime of Haas. The reserve in the company's hands was more than sufficient to carry the policies until after the death of Haas, hence, unless in his lifetime he had abandoned or surrendered the contract, the liability became fixed on the happening of that event. In *Rye v. New York Life Ins. Co.*, 88 Neb. 707, the refusal to enforce the contract was

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based in part on the fact that there was no reserve in the hands of the insurer at the time the policy matured. We find it unnecessary to consider the New York statutes and cases cited, but merely remark that, in cases where the court found the policies had not been forfeited by notice under the statutes, the views of the courts of that state, if we understand them correctly, are not inconsistent with those herein expressed.

The provisions in the policy giving options to the insured after a default in the payment of premiums on the day fixed must be considered in connection with the law as to the nature of the life insurance contract and the fact of there being no forfeiture clause in the policy. While Haas might have exercised one of these options, he did not choose to do so. He was not bound by his contract so to do, but had the right to rely upon the main and not upon the ancillary or subordinate stipulations, if it seemed best to him. We are also of opinion that the incontestable clause of the policy does not apply to the nonpayment of premiums, and that the insurance company had the right to predicate its defense upon that ground, or on that of abandonment, after the expiration of the time limited in that clause as well as before.

There remains only the question of abandonment. This is a question of fact for the jury to determine under proper instructions.

The judgment of the district court is reversed and the cause remanded.

REVERSED.

HAMER, J., not sitting.

GOMER THOMAS, APPELLEE, v. PETER W. SHEA, APPELLANT.

FILED FEBRUARY 29, 1912. No. 16,602.

1. **Trial: INSTRUCTIONS: SUBMISSION OF PLEADINGS TO JURY.** A judgment will not be reversed because the trial court, instead of stating the issues of fact in concise form, gave an instruction containing the substance of the petition, answer and reply, and permitted the jury to take the pleadings with them to the jury room, where such issues were fairly stated in other instructions, and it appears that the appellant was not prejudiced by the erroneous practice adopted.
2. **Libel: TRIAL: DIRECTING VERDICT.** An instruction to find for plaintiff in an action for libel, unless the charges therein and each and every part thereof are found to be true, may not be prejudicial to defendant, as requiring stronger proof of the truth of the charges than substantial accuracy and as demanding proof of immaterial statements, where plaintiff, on undisputed evidence, was entitled to a verdict for nominal damages at least.
3. ———: ———: **INSTRUCTIONS: REFERENCE TO SPECIFIC EVIDENCE.** In the trial of an action for libel, where evidence is admitted to prove charges not pleaded for the purpose of showing malice, it is not error for the trial court in limiting such evidence to that purpose alone to single it out in an instruction.
4. **Appeal: INSTRUCTIONS.** On appeal, harmless error in an instruction is not a ground of reversal.
5. **Trial: WITHDRAWAL OF EVIDENCE BY INSTRUCTION.** The admission of improper evidence may be cured by an instruction withdrawing it from the jury.
6. **Libel: DAMAGES.** In an action for libel resulting in injury to plaintiff in his profession of attorney at law, a verdict for \$3,000 held not excessive.

APPEAL from the district court for Harlan county:
HARRY S. DUNGAN, JUDGE. *Affirmed.*

C. M. Miller and W. S. Morlan, for appellant.

*John Everson, J. G. Thompson and Gomer Thomas,
contra.*

ROSE, J.

This is an action for libel, in which plaintiff recovered a judgment for \$3,000. Defendant has appealed.

The libel was published a few days before the general election in 1908, when defendant was a member of the county board of Harlan county, and when plaintiff, to succeed himself as county attorney, was the candidate of the democratic, people's independent and republican parties. The libel is a six-column document resembling in appearance the front page of a metropolitan daily. It is addressed "To the Taxpayers of Harlan County," in bold letters nearly an inch high, emphasized by a heavy rule-line. It is introduced by a scarehead warning that plaintiff never would have received the nomination of any party had the honest citizens of Harlan county known how he served them as county attorney during the past two years. A discussion of five cases of public interest follows. If the statements published by defendant are true, plaintiff, in each case, neglected his official duties or betrayed his trust as county attorney. Portions of that part of the publication relating to the cases may be summarized thus:

(1) "Mullally Case." Mullally failed to report for taxation a deposit of money in excess of \$17,000, and the assessor was directed by the county board to list it. Mullally appealed to the district court, and there, through a technicality, defeated the county. Afterward plaintiff was elected county attorney, and "advised the board to order an appeal to the supreme court and that he would win the case for the county." An appeal was accordingly taken and briefs costing the county \$16 were printed. When plaintiff was present in the supreme court the case was stricken from the docket for want of briefs. "It developed later that the briefs which meant \$400 to Harlan county were securely locked in the county attorney's desk in Alma."

(2) "The Wirt Cattle Company's Decision." The

county board refused to strike from the assessment rolls a list of fat cattle on the ground they had been assessed in Colorado. The owner appealed to plaintiff, "who promptly ruled that the cattle were exempt from taxation and that they should be stricken from the schedules." The board "called in all of the Alma attorneys," and stated its positions and findings and plaintiff's opinion overruling the same. They decided plaintiff's opinion was not sound, and that such cattle should be listed, thus saving several thousand dollars to the county.

(3) "Brandt v. Olson." Brandt fenced a highway, and enjoined Olson, a road overseer, from interfering with the fence. The case was appealed to the supreme court. A former county attorney wrote the briefs and turned them over to plaintiff as his successor. Defendant notified other attorneys to be on the alert, expressing the belief that plaintiff was against the county. Brandt's attorney made a motion to strike the case from the docket of the supreme court for want of a brief on behalf of the county, but admitted he had been served with a copy thereof. The court gave the county five days to furnish the missing briefs and the case was argued. Later another attorney found the briefs locked in plaintiff's desk at Alma. The supreme court decided the case in favor of the county, but a rehearing was granted on motion of Brandt. When the case was reargued the county was represented by attorneys Morlan and Miller, but plaintiff was in the supreme court room at the time, and his expenses were paid by the county, "supposing that he was there in the county's interest in the 'Mullally Case.'"

(4) "The Lucas Murder Trial." The trial and acquittal of this man by a Harlan county jury on a change of venue from Phelps county, where he had been charged with murder, is well known. "The stigma resulting from this verdict must remain a blot on the fair name of our county, which will require years to wipe out. Don't forget that at the time of the trial Gomer Thomas was not only county attorney and acting for the county, but

was also in possession of a very liberal retainer from Phelps county to further assist in the selecting of a jury." After the first trial in Harlan county, resulting in a verdict of guilty, defendant was told by one of the jurors that he was approached by two Harlan county citizens, "one of whom made a great effort to influence his verdict in that case, and that he could have made \$1,000 for a dishonest verdict." Defendant kept this information in confidence until a new trial was ordered by the supreme court. Before the retrial he told the district judge to acquaint plaintiff with what the juror had said. When the county board met, after Lucas had been acquitted, defendant informed its members and plaintiff what the juror had reported and insisted that the matter should be investigated. At the next meeting plaintiff informed the board that he had seen the juror, who related the conversation substantially as repeated by defendant. There were other suggestions of attempted bribery. Plaintiff stated to the board that the evidence of bribery was insufficient to convict the offenders. Defendant offered a resolution requesting the district judge to convene a grand jury to probe the matter. The resolution was not adopted, but defendant was told by a supervisor that such action would be a useless expenditure of county funds so long as Gomer Thomas remained county attorney. "It certainly could not add to Mr. Thomas' reputation as county prosecutor to have all the ex-professional jury-fixers and railroad lobbyists lined up in the interest of his nomination."

(5) "The K. C. & O. Deal." Plaintiff, as county attorney, read and the board adopted a resolution ordering him to begin an action to annul as unconstitutional the merger of the Kansas City & Omaha Railroad with the Burlington & Missouri River Railroad. Ten months later he entered into a deal with the Burlington & Missouri River Railroad Company by which the latter deeded to the town of Alma some 40 acres of land, the consideration being \$1, with the implied understanding that the action would not be pushed.

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The foregoing is only a brief summary of a portion of the libel, but it indicates the nature of the accusations, when considered with the conclusion which is here quoted:

"I have *went* into these five cases in some length, and have produced sufficient facts to convince any fair man that County Attorney Thomas, in the five cases cited, gave the county, who pays him his monthly salary, the worst end of the bargain. And, as a matter of fact, Mr. Thomas could not have rendered a greater service to the opposition had he actually been retained by them and accepted their money.

"I fully understand how difficult the undertaking, with at least a show of indorsement by the three largest political parties, and the court house ring at his beck and call, it would be to bring about the defeat of Gomer Thomas for the office which he now holds, and which he brought into disgrace along with the fair name of our county; nothing short of a revolution can accomplish it. But history chronicles successful revolutions.

"Should this revolution be brought about, the taxpayers of Harlan county will witness a grand exodus of juryfixers, political porch climbers and petty criminals such as this county never witnessed before in its history.

"Should C. M. Miller succeed to the office of county attorney, our people can rest assured that, in the event of another Lucas trial in the county, they will not be compelled to hang their heads for shame when the fact is mentioned. They can rest assured that their interests will be looked after regardless of the wealth of the offender against our laws. And land donations will not suffice to purchase immunity to a faction of our people when the interests of the taxpayers of the entire county are involved.

Your humble servant,

"P. W. SHEA, Orleans, Neb."

In his answer defendant admits that he caused the article pleaded in the petition to be printed and that he disseminated it throughout Harlan county. He pleads

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that plaintiff at the time was a candidate for the office of county attorney and that the publication was a privileged communication. He further states in his answer: "Each and all the statements contained in said article of and concerning said plaintiff and his doings in said office were true and the same were published and printed without malice, and the same was a communication made by this defendant to the electors of said county in good faith for the sole purpose of advising them of the real character and qualifications of the plaintiff for the office he was then seeking."

The first assignment of error relates to an instruction, wherein the trial court stated to the jury the substance of the pleadings, and closed with these words: "You will be permitted to take the pleadings, viz., the petition, answer and reply to the jury room with you, where you will find the claim of the parties fully set out." The objection to the instruction is that the trial court gave the jury a copy of the petition, answer and reply, without a concise statement of the issues of fact, and allowed the pleadings to be taken to the jury room. With the exception of the libel, which is embodied in the petition and attached as an exhibit, the pleadings are brief. The substance of the allegations of both parties seems to be fairly stated in the instruction. Though the issues were not as concisely stated as they should have been, defendant nevertheless was protected by other parts of the charge. In another instruction the jury were told that the first issue of fact was whether defendant was actuated by malice in publishing the article in controversy. They were also directed to find in his favor unless plaintiff showed the existence of such malice by a preponderance of the evidence. Attention has not been directed to a request by defendant for an instruction containing a precise statement of all of the issues of fact raised by the pleadings. While there is no excuse for the practice adopted by the trial court, the record does not show that the error was prejudicial to defendant.

Defendant also challenges an instruction containing this language: "It is your duty to find a verdict in favor of the plaintiff and against the defendant, unless you further find from the evidence that the charges in said article, and each and every part thereof, to be true as alleged in the answer of defendant, and that the same was published without malice on the part of the defendant, and that its publication was with good motives and for justifiable ends." The argument is that, contrary to this instruction, defendant was in law only required to prove that the material parts of the accusations were substantially true and that the publication was made with good motives and for justifiable ends, without additional proof that he acted without malice. Neither party should have been embarrassed by the obvious blunder disclosed by the language quoted. While defendant pleaded in his answer that "each and all the statements contained in said article of and concerning said plaintiff and his doings in said office were true," this plea did not justify the use of a similar form of expression in the charge to the jury, since the publication contained many immaterial statements which were wholly disregarded in the making of the defense and which could not possibly have injured plaintiff, if shown to be true. There are reasons, however, why the judgment should not be reversed for the error in this instruction. The publication was libelous *per se*. Defendant stated on the witness stand that he sent a few copies outside of Harlan county. He admitted that he sent one copy to Adams county to the district judge before whom defendant practiced his profession. He also sent a copy to Holdrege to the county attorney of Phelps county. These communications were not privileged. There is no proof that defendant circulated the libel outside of Harlan county with good motives and for justifiable ends. To this extent his malice is conclusively established by his own proofs. It follows that when the case was submitted to the jury plaintiff was entitled to a verdict for nominal damages at least.

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Plaintiff's right to a verdict having thus been shown, was the erroneous instruction prejudicial to defendant? The first instruction given by the court contained a statement of the pleadings. The language criticised is found in the next instruction, which is here copied in full: "You are instructed that the defendant has admitted that he published and circulated the article set forth by plaintiff. You are also instructed that said article charges the plaintiff with official misconduct, and of corruption in the discharge of his said office, which as a matter of law are libelous charges in themselves, and you are instructed that it is your duty to find a judgment in favor of the plaintiff and against the defendant, unless you further find from the evidence that the charges in said article, and each and every part thereof, to be true as alleged in the answer of defendant, and that the same was published without malice on the part of the defendant, and that its publication was with good motives and for justifiable ends." It will be observed that the charges which defendant, to escape liability, was required to prove were preceded in the same instruction by these words: "Said article charges the plaintiff with official misconduct, and of corruption in the discharge of his said office." It thus appears that the trial court, in requiring proof of the charges, and of "each and every part thereof," had reference to charges of official misconduct and of corruption in office. This is a fair deduction from all of the instructions, which must be interpreted together. Defendant requested and the court gave an instruction that "under the evidence in this case each part of the entire publication set forth in plaintiff's petition is entitled to equal credit with all other parts, and in arriving at a verdict the article alleged to have been published is to be construed by you as a whole, and each part given such construction as will make it consistent, if possible, with all other parts of the same writing." The trial court went further and also instructed the jury: "The defendant had a perfect right, by virtue of being an elector and

member of the board of supervisors of said county, and it was his privilege, to give the public any information on public matters that came within his knowledge and give a reasonably correct account of whatever occurred before the board of supervisors, not necessarily in every word, or every particular, but as to the substance; that is, he had a right to give a correct account of what he saw and knew. If it turns out that it is reasonably correct and he did not go beyond his duty in magnifying or making false statements or anything to show express malice in the case, he had a right to so do, and is in no manner liable to the plaintiff for so doing." In other instructions the jury were told that the truth, when published with good motives and for justifiable ends, is a sufficient defense; that if the statements made were substantially true defendant had a right to publish them, because they were privileged; and that the verdict should be in favor of defendant, unless plaintiff showed by a preponderance of the evidence the existence of malice on part of defendant in publishing the article. It has already been shown that plaintiff on undisputed facts was entitled to a verdict. The instruction criticised related to the liability of defendant for publishing the libel, and not to the measure of damages. When all of the instructions are considered, the jury were not instructed that, if defendant had failed to prove the exact truth of immaterial accusations, they must find for plaintiff. The conclusion is that the instruction does not contain prejudicial error.

Another instruction is criticised on the ground that it gives undue prominence to a part of the evidence. The trial court permitted plaintiff to prove that defendant subsequently published or uttered statements other than those found in the original accusations. The instruction assailed contains a reference to evidence of this character. By it the jury were told the burden was on plaintiff to convince them by a preponderance of the evidence that defendant acted maliciously in publishing his circular. They were also directed, in determining the question of

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malice, to "take into consideration all the evidence bearing on the truth or falsity of the facts set out in the circular complained of in the petition, and any other publication or statements made by the defendant, relative to the plaintiff, similar to those charged in the circular complained of, if any such appeared in the evidence, the circular itself, and all the facts and circumstances surrounding the publication." Reference was made to the testimony as to other accusations for the sole purpose of limiting the jury's consideration thereof to the question of malice. This is clearly shown by another instruction directing the jury to consider such evidence for that purpose alone, and making it plain that it could not be considered to prove or enhance damages. The instruction was favorable to defendant, and properly singled out the evidence described with the object of limiting its consideration to the purpose for which it was admitted.

Inconsistency in instructions on the burden of proof is the basis of another assignment of error. Considering the charge as a whole, the instructions on the burden of proof seem to be as favorable to defendant as the law permits. The apparent conflict relates to proof essential to a recovery, or to the establishment of a defense, and not to the measure of damages. For reasons already stated, plaintiff was clearly entitled to a verdict. Under this assignment prejudice to defendant is not shown by the record.

It is further argued that the trial court erred in admitting in evidence proof of libels and slanders having no relation whatever to the substance or import of the publication on which the action is based. It is conceded by defendant that previous publications or repetitions similar to accusations pleaded in an action for libel are admissible in evidence to show malice. *Bloomfield v. Pinn*, 84 Neb. 472; *Fitzgerald v. Young*, 89 Neb. 693. It is insisted, however, that proof of independent charges which may be made the subject of separate suits is inadmissible. This proposition has been ably presented by counsel for de-

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fendant, but a determination of the question does not seem to be necessary, for the following reasons: The trial court instructed the jury that damages could not be proved or enhanced by evidence of that character. It has often been held that the admission of improper evidence may be cured by an instruction withdrawing it from the jury. *American Building & Loan Ass'n v. Mordock*, 39 Neb. 413; *Nelson v. Jenkins*, 42 Neb. 133; *Chicago, R. I. & P. R. Co. v. O'Neill*, 58 Neb. 239; *Missouri P. R. Co. v. Fox*, 60 Neb. 531; *Scott v. Flowers*, 60 Neb. 675. Plaintiff's right to recover was fully established by other evidence not disputed, and the jury were not permitted to consider independent accusations in determining the measure of recovery. It seems clear, therefore, that if errors were committed in the manner stated they were not prejudicial to defendant.

Excessive recovery is another ground of complaint. The evidence justifies findings that plaintiff neglected no official duty to the injury of the county, and that all statements reflecting upon his integrity, motives and conduct, or upon his ability and uprightness as a lawyer or public officer, are false. The entire publication was a vicious assault upon plaintiff in his profession of attorney at law. It strikes at his means of livelihood. If the accusations are true, he is unfit to be county attorney or to act professionally for an honest client. Those who believe the charges will not employ him, if they want honest service. Defendant admitted on cross-examination that 2,500 copies were printed and that he distributed 1,400 by mail. In determining compensatory damages in such a case, no method of exact computation can be devised, and the amount of recovery must generally be left to the sound discretion of the jury. Having asserted on appeal that the recovery is excessive, it is incumbent on defendant to establish the error. The reasons urged are not convincing, and substantial grounds for holding that the verdict is excessive have not been found in an examination of the entire record. All of the assignments of error

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have been carefully examined without finding a reversible error.

AFFIRMED.

REESE, C. J., took no part.

EDMOND HANS, APPELLEE, v. AMERICAN TRANSFER COMPANY ET AL., APPELLANTS.

FILED FEBRUARY 29, 1912. No. 16,983.

1. **Trial: INSTRUCTIONS: REVIEW.** In reviewing instructions the charge to the jury should be construed as a whole.
2. **Appeal: INSTRUCTIONS: REVIEW.** An assignment that a particular instruction is erroneous may be overruled on appeal without an examination of its merits, where appellant disregarded the rule requiring him to insert in his abstract the entire charge, if he objects to any part of it.
3. ———: **OFFER OF PROOF.** Error cannot be predicated on a rejected offer of proof not within the limits of the question asked.
4. **Witnesses: EXAMINATION.** "Questions propounded to a witness must not assume the existence of a fact not proven in the cause." *Bennett v. McDonald*, 59 Neb. 234.

APPEAL from the district court for Douglas county:
WILLIAM A. REDICK, JUDGE. *Affirmed.*

McGilton, Gaines & Smith, for appellants.

H. S. Daniel and John A. Moore, contra.

ROSE, J.

While plaintiff was in the employ of defendants, he fell from a wagon-load of manure at a dump in Omaha and broke one of his legs. This is an action to recover damages in the sum of \$12,600 for the injuries thus sustained. The negligence imputed to defendants is their failure to furnish a key to keep the king-bolt of the wagon in place.

Defendants denied negligence, and pleaded that plaintiff was intoxicated and that his injury resulted from his own carelessness. The jury rendered a verdict in favor of plaintiff for \$1,750, and from a judgment therefor defendants have appealed.

Two instructions are criticised by defendants in this language: "After correctly stating the law with respect to the facts which constitute negligence and of intoxication upon the part of the plaintiff, the jury were told that if they found from a preponderance of the evidence either that the failure upon part of plaintiff to act in a manner in which an ordinarily prudent person would have done under the circumstances, and said failure contributed to cause his injury, or if they found from a preponderance of the evidence that at the time of the accident plaintiff was intoxicated, and such intoxication directly contributed to his injury, then they would be justified in finding the plaintiff guilty of contributory negligence, and in either of such cases their verdict should be for defendants. Our criticism of this instruction is that it lacks the element of command." It is unnecessary to consider the merits of the criticism on the two instructions assailed for the following reasons: The case was submitted on a printed abstract. In the preparation of abstracts the rule relating to instructions is: "Where no objection is made to the giving or refusing of any instruction, omit all, but where there is objection as to the giving or refusal to give any instruction or instructions, set out the whole charge, pointing out specifically the instructions excepted to." 89 Neb. viii. In utter disregard of this rule, the abstract contains only the two instructions criticised, which are numbered 13 and 14. The charge to the jury must be construed as a whole. Without a resort to the official transcript of the proceedings below, it cannot be said that the trial court did not give, at the request of defendants, or on its own motion, an instruction containing the elements of command not found in the instructions appearing in the abstract. Since the merits of defendants'

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criticism depend on matters not found in the abstract, the transcript will not be examined in this case for the purpose of establishing error.

The remaining errors assigned are based on the refusal of the trial court to permit the assistant pay clerk of the Union Pacific Railroad Company to answer the following questions: (1) "Do you know the reason why Hans left the services of the Union Pacific?" (2) "You may state why Hans was let out of the services of the Union Pacific." The substance of defendants' argument on this point may be stated thus: Plaintiff testified that at the time of the injury he was a strong, able-bodied man, capable of earning \$100 a month; that his regular occupation had been railroad work; that he worked for the Union Pacific four or five months in 1907, having had charge of an engine as foreman of the switchmen, and that he had earned from \$100 to \$135 a month. The testimony of the assistant pay clerk of the Union Pacific showed that the entire sum earned by plaintiff as switchman during the year 1907 was \$70.88, and there was no proof that he had worked for any other railroad company. To meet his proof that he was capable of earning from \$100 to \$135 a month as switchman, defendants offered to prove that such an occupation was not open to him; that when he had such a position his habits of intoxication unfitted him for the performance of his duties and caused him to lose his employment. Though this argument is directed to both questions and to all of the offers thereunder, the trial court ruled separately on the questions presented, and they will be reviewed separately.

(1) After objections to the question, "Do you know the reason why Hans left the services of the Union Pacific?" had been sustained, defendants offered "to show that the witness knows why," and "that Hans' habits were those of intoxication, so that he was unfitted to perform his duties." The rejection of the first offer was clearly not prejudicial, if proper, and the second was not responsive to the question. Error cannot be predicated on a rejected

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offer of proof not within the limits of the question asked. *Barr v. Post*, 56 Neb. 698.

(2) When the trial court sustained objections to the question, "You may state why Hans was let out of the services of the Union Pacific," defendants made the following offer: "We offer to show that the reason why was that because his habits of intoxication were such he was unfitted to perform his duties." The question was propounded on direct examination to defendants' own witness and clearly assumed that plaintiff had been discharged by the Union Pacific, a fact not proved. On that ground the question was improper. "Questions propounded to a witness must not assume the existence of a fact not proven in the cause." *Bennett v. McDonald*, 59 Neb. 234.

No error having been found, the judgment is

AFFIRMED.

CARL CHRISTIAN PETERSON, APPELLEE, v. JOHN W.
PURINTON ET AL., APPELLANTS.

FILED FEBRUARY 29, 1912. No. 16,857.

Appeal: HARMLESS ERROR. A judgment will not be reversed on account of harmless error.

APPEAL from the district court for York county:
BENJAMIN F. GOOD, JUDGE. *Affirmed.*

J. J. Thomas, J. W. Purinton and Edwin Vail, for appellants.

Power & Meeker, contra.

FAWCETT, J.

This is a suit to foreclose a mortgage for a balance due for the construction of three dwelling-houses. Cross-petition for damages by reason of alleged defects in

workmanship and inferior material used by plaintiff in such construction. Findings and judgment of foreclosure for plaintiff and against defendants on their cross-petition. Defendants appeal.

The points argued by defendants are: (1) That the court erred in permitting plaintiff to amend his petition, asking for a deficiency judgment against the defendant Ida M. Purinton. The reply having specifically admitted "that the contract evidenced by the note and mortgage described in the petition of the plaintiff did not relate to the separate business or estate of the defendant Ida M. Purinton, and was not made upon the faith and credit thereof," we think the amendment of the petition should not have been allowed; but as the decree does not contain either a finding or judgment against Mrs. Purinton, personally, she has nothing to complain of, and the error in permitting the amendment was, therefore, without prejudice. (2) That the court erred in overruling defendants' request for a jury. (3) That the findings and judgment of the court are not sustained by sufficient evidence. These two assignments will be considered together. The evidence is so overwhelmingly against defendants' contention that we do not deem it necessary to set it out here. It shows conclusively that, if there were any defects in material or construction, long after such defects were fully known by Mr. Purinton, he figured up with plaintiff the balance due him upon his contract for the construction of the houses, and adjusted that balance by the giving of the note and mortgage in suit. No other judgment than that entered by the court could have been permitted to stand, and, if a jury had been impaneled, as requested by defendants, it would have been the duty of the trial court to have directed a verdict in favor of plaintiff. Such being the fact, the question as to whether or not a party is entitled to a jury in a case like this need not be considered.

AFFIRMED.

STATE, EX REL. BARTON L. GREEN, APPELLEE, v. E. B. COWLES, COMMISSIONER OF PUBLIC LANDS AND BUILDINGS, ET AL., APPELLANTS.

FILED FEBRUARY 29, 1912. No. 17,027.

1. **School Lands: LEASES: DEFAULT OF LESSEE: NOTICE.** The requirement of section 17, ch. 80, Comp. St. 1911, that, in the event of a default by any lessee of educational lands in the payment of the semiannual rental due the state, the commissioner of public lands and buildings may cause notice to be given to such delinquent lessee or purchaser that, if such delinquency is not paid within 90 days from the date of the service of such notice, his lease or sale contract will be declared forfeited by the board of educational lands and funds, and that the service of the notice contemplated is "to be made by registered letter," is not satisfied by the mailing by the commissioner of the required notice, in a registered letter addressed to a lessee not then living; notwithstanding the fact that said section contains the further proviso that, "In serving the notice of delinquency and forfeiture herein provided for the commissioner shall recognize as the lessee or owner of the lease or sale contract the person, or persons, whose title appears last of record in his office."
2. ———: **FORFEITURE: SUBSEQUENT LEASE: DISCRETION OF BOARD.** And where the board, acting upon such insufficient notice, forfeits a lease on account of such a default, and again offers the land at public sale, and the county treasurer accepts an application and bid from a proposed subsequent lessee, and makes due report of his proceedings; and the commissioner of public lands and buildings, prior to having executed a lease to such subsequent lessee, becomes advised of the fact of the want of jurisdiction by the board in canceling the former lease, and of the further fact that the executor of the will of such former lessee has made good the default, with interest and all penalties, by payment of the money therefor to the county treasurer, it is not only within the sound discretion, but it is the duty of, the commissioner to refuse to issue a lease to such subsequent lessee.
3. **Mandamus: DENIAL OF WRIT.** In an action for mandamus, where it clearly appears that to compel the respondent to do the act demanded in the application for such writ would be to compel him to do a wrong, the writ will be denied.

APPEAL from the district court for Lancaster county:
ALBERT J. CORNISH, JUDGE. *Reversed and dismissed.*

Grant G. Martin, Attorney General, and Frank E. Edgerton, for appellants.

Barton L. Green, contra.

FAWCETT, J.

From a judgment of the district court for Lancaster county, awarding the relator a writ of mandamus commanding the respondent to issue to relator a lease of certain saline lands in Lancaster county, respondent appeals.

The case was submitted in the court below upon the pleadings and stipulation of facts. From the affidavit of relator and the stipulation of facts referred to, we are advised: That the land in controversy was sold to one William Robertson on May 14, 1894; that on May 24, 1904, Mr. Robertson died, testate, and letters testamentary were issued March 11, 1905; that the will made no reference to the lands in controversy, but left all of the property of the deceased, not specifically devised, to certain of his children who at the time of the making of the will and at the time of the trial were minors; that on January 1, 1908, default was made in the payment of the annual instalment of interest due the state; that this default continued until after November 17, 1909; that on January 1, 1909, the then commissioner of public lands and buildings sent a notice in writing, by registered letter, addressed to "William Robertson, Lincoln, Neb.," stating that if delinquency was not removed within 90 days from the date of service of said notice his contract would be declared forfeited by the board of educational lands and funds; that the return card for this letter was received and bore the signature "William Robertson;" that this signature was made by an adult son of the deceased, of that name. This son was not one of the children of the deceased who, by the terms of the will, became the owners of the property in controversy or of the leasehold interest therein,

nor is it shown that he was executor of the will or administrator of his father's estate. On October 13, 1909, the board of educational lands and funds declared the contract forfeited, the board at that time being ignorant of the fact that William Robertson was dead and that legal notice of the forfeiture had not been given to his devisees or legal representatives. The land was again offered for sale in public manner on November 8, 1909, after publication of notice for three weeks prior thereto. At this public sale the relator made the highest bid, filed his written application for a lease, and his payment and application were accepted by the county treasurer. The relator subsequently demanded of the respondent a lease for the land, which respondent refused to issue, assigning as his reason for such refusal "that there was irregularity in the notice of delinquency upon said contract issued to William Robertson, for the reason that said William Robertson was deceased at the time notice of delinquency was sought to be served upon him, and for the further reason that the card acknowledging receipt of delinquency issued by the commissioner was signed by some other person than the said William Robertson." The public sale, it will be remembered, was on November 8. The stipulation of facts recites: "Said William Robertson, deceased, left a will, but in it did not specifically refer to said lease, and the executor of said will did not know until after the 9th day of November, 1909, that said William Robertson, deceased, was the owner of record of said lease, but that, as soon as he discovered said fact, he immediately paid to the county treasurer of Lancaster county all of the rentals on said land for the year 1909 and the first half of 1910, with all expenses, premiums and charges required by the said county treasurer, which said sum was by him accepted."

The question presented is simply this: Will the court, in the face of the facts and circumstances above outlined, compel the respondent by mandamus to execute and deliver to the relator a lease for the lands in controversy?

We are unable to discover any theory upon which this should be done. It is not disputed that, under the provisions of the statute, the lease to Mr. Robertson could not be forfeited and the lands again leased, except after due notice of delinquency. The statute in force at the time the Robertson lease was executed required personal service. As subsequently amended it provides: "The service of the notice herein contemplated, to be made by registered letter." Comp. St. 1911, ch. 80, sec. 17. It is contended by the respondent that this amendment is inoperative as against leases executed under the prior statute. We find it unnecessary to decide that question, for the reason that, in our opinion, no notice was served as contemplated by either statute. It is true the statute provides: "In serving the notice of delinquency and forfeiture herein provided for the commissioner shall recognize as the lessee or owner of the lease or sale contract the person, or persons, whose title appears last of record in his office." It is also true that "William Robertson" was the name of the person whose title appeared last of record in the office of the commissioner at the time of the mailing of the notice; but we think it would be imputing to the legislature the most absurd and unheard of ideas of justice to hold that its intention was that the statute requiring notice of delinquency and of a proposed forfeiture could be satisfied by mailing a registered letter to a dead man. A dead man is no man. The moment the breath of life leaves his body he ceases to be a man under every reasonable construction of either law or common sense. If, then, on January 1, 1909, there was no such man in existence as "William Robertson," no notice could be given to him, and it would be the duty of the commissioner to serve the notice upon the heirs, devisees, or executor of the will, of such deceased person. Had the registered letter been mailed to them, it is possible, although we do not so decide, that the forfeiture might have been sustained.

There is another reason why this writ should not issue. It having come to the knowledge of the respondent that

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there had been no service of the notice upon the executor or devisees of Mr. Robertson, and that the executor immediately upon learning of the default had removed the same by making full payment of all rentals due, together with all penalties by reason thereof, it was not only within his sound discretion, but it was his duty, to refuse to issue a lease to relator. For him to have issued a lease under such circumstances would have been to perpetrate a wrong and to place the state in a very unenviable light, to say the least. We said in *State v. Scott*, 17 Neb. 686: "We will not grant a mandamus, however, to compel the board to accept a bid for the sale or lease of the school lands unless it is clear that there is an abuse of discretion." In this case it is clear that the respondent was not guilty of any abuse of discretion. The district court, therefore, erred in granting the writ.

The judgment of the district court is reversed and the action dismissed at relator's costs.

REVERSED AND DISMISSED.

MARY A. BAYER ET AL., APPELLANTS, V. FRANK J. BAYER
ET AL., APPELLEES.

FILED FEBRUARY 29, 1912. No. 16,616.

1. Pleading: PETITION IN EQUITY: JOINDER OF CAUSES OF ACTION. A demurrer to a petition in equity on the ground that several causes of action are improperly joined cannot be sustained because of uncertainty as to which of the plaintiffs is entitled to the relief demanded. If the uncertainty as to the respective rights of the plaintiffs arises from the language of the grant under which they claim, it is for a court of equity to determine their respective rights.
2. Quieting Title: PARTIES. A plaintiff who claims a life interest in real estate may join with those who claim the remainder in an action to quiet title against one in possession who refuses to recognize the right of either and claims the land under a clause in the deed through which all of the plaintiffs derive their rights.

APPEAL from the district court for Kearney county:
HARRY S. DUNGAN, JUDGE. *Reversed.*

J. L. McPheely, for appellants.

Adams & Adams, contra.

SEDGWICK, J.

This action was begun in the district court for Kearney county by the plaintiff Mary A. Bayer and her six children. Five of the children being under age, the action was brought in their behalf by their mother as next friend and guardian. The defendant Frank J. Bayer filed two several demurrers to the petition, which were sustained, and, the plaintiffs electing not to plead further, the action was dismissed, and the plaintiffs have appealed.

The petition alleges that on the 5th day of December, 1902, one Thomas Bayer and his wife deeded the land in question to the plaintiff Mary A. Bayer and the defendant Frank J. Bayer; that at that time these grantees named in the deed were husband and wife, and the other plaintiffs in this case were their children. The deed is set out in the petition and appears to be in form an ordinary warranty deed to "the legal heirs of the body of Frank J. Bayer and Mary A. Bayer." The deed contained the following provision: "Reserving however unto Frank J. Bayer and Mary Bayer his wife, or either of them so long as they or either of them may not marry again, a life estate in and to said premises. It is further provided that none of the children of said Frank J. and Mary Bayer, or the representatives of a deceased child, shall maintain a partition suit for said premises until the youngest child of said Frank J. and Mary Bayer shall have reached its majority. It is further provided that neither Frank J. Bayer nor Mary Bayer shall have the right to sell or convey their said life estate, the grantors herein intending that the said lands shall be a home for the said

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children and their parents until said youngest child shall attain its majority." The petition then alleges that soon after the 3d day of June, 1906, the plaintiff Mary A. Bayer began an action in the district court for Box Butte county for a divorce against the defendant Frank J. Bayer on the ground of extreme cruelty, and for the care and custody of the six children, and for alimony; that in that action judgment was rendered granting her all the relief prayed for, and that she has since that time had the care and custody of the children and provided for them, and that the defendant has not paid the amount adjudged against him in the divorce proceedings. The petition then alleges that in September (without alleging the year) the defendant Frank J. Bayer and the defendant Bonnie Bayer were married, and ever since that time have been living together as husband and wife. The petition demurred to was an amended petition, which appears to have been filed September 18, 1909, so that the alleged marriage must have taken place before that date and after the decree of divorce. There is no direct allegation that the defendants are in possession of the real estate described in the petition, but it is alleged that the defendant Frank J. Bayer farmed the real estate in 1907, 1908 and 1909, and refuses to pay any rent for the same. This, as against a general demurrer, must be taken as a sufficient allegation of possession.

The two demurrers filed by the defendant Frank J. Bayer were upon the ground that "several causes of action were improperly joined," and "for that the petition does not state facts sufficient to constitute a cause of action in favor of the said Mary A. Bayer, plaintiff, and against this defendant," and "for that the petition does not state facts sufficient to constitute a cause of action in favor of the plaintiffs and against this defendant." There was no oral argument on behalf of the defendant, but the reason for sustaining these demurrers is stated in the brief, as follows: "Our contention is that there was a misjoinder of causes of action; also, that on account of the relation

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of the parties the petition did not state facts sufficient to constitute a cause of action in favor of Mary A. Bayer, in her own right, nor did it contain facts sufficient to constitute a cause of action in favor of the children, when joined in the same petition with Mary A. Bayer in her own right." It is then stated in the brief that "the legal title or the fee simple title is conveyed to the legal heirs" of Frank J. Bayer and Mary A. Bayer, and it is also stated in the brief that the provision in the deed reserving "a life estate" to Frank J. Bayer and Mary A. Bayer, his wife, "or either of them so long as they or either of them may not marry again," must be construed to mean that the marriage of either of them would terminate the life estate of both. We think that the defendant is wrong in all of these propositions, and the demurrers should have been overruled.

The suggestion in the brief that the grantor in the deed referred to did not have in mind a divorce for the parties, but had in mind the possible termination of the marriage relation by the death of one of them, cannot be derived from the terms of the deed. The language seems to be plain and unambiguous. The provision contemplates that the marriage might be dissolved, and whether this happened by death or divorce would be immaterial. So long as "either of them" did not marry again he or she would be entitled to a life estate in common with the other, but when one of them married again his or her rights in the land entirely ceased. As the plaintiff Mary A. Bayer has not married again she would seem to be entitled to the use of this land, which right would continue as long as she lived single. This interest is a life estate and the remainder to the children.

The defendants' brief says that if Mary A. Bayer is entitled to the rents and profits, the children are not, and, if the children are entitled, then the mother is not. "Hence, here are two different parties entirely, joined in one petition with no community of interests against a defendant, both asking for relief, based upon the same

subject matter." This urges the doubt whether the mother or her children have a right to maintain the action as a sufficient reason for denying any of them relief. They are all interested in having that doubt resolved, and may maintain their action for that purpose. These defendants cannot complain of their doing so. This question is for a court to determine; and when that court has taken jurisdiction it should do complete justice to all parties. While there is no direct statement in the petition of the interest in the land claimed by the defendants, it sufficiently appears that one of these defendants has claimed and had the use of the land while the divorce proceedings were pending and continuously thereafter. If he does not now claim any interest in the land and is ready to surrender it to the other plaintiffs, he should make it appear by answer, and might avoid costs by so doing. The prayer is for judgment for rent and profits, and that the title may be quieted in the plaintiff's children, and that the defendants be barred from interfering with the title or possession, and for general equitable relief. There can be no doubt that under these facts a court of equity has jurisdiction to determine the rights of the parties in this land and to do complete equity by giving possession of the land to the parties entitled to it.

The judgment of the district court is reversed and the cause remanded for further proceedings.

REVERSED.

LETTON, J., not sitting.

FARMERS & MERCHANTS IRRIGATION COMPANY, APPELLANT,
v. S. J. HILL, APPELLEE.

FILED FEBRUARY 29, 1912. No. 16,959.

Waters: ACTION ON IRRIGATION CONTRACT: LIABILITY OF SUBSEQUENT GRANTEE. A purchaser of land from one who holds a water-right contract thereon with an irrigation company, and who takes title

thereto by a deed containing the ordinary covenants of warranty, with no reference to the question of water rights, and who refuses to accept water from the company, is not personally liable for the maintenance fee mentioned in the water-right contract between his grantor and the irrigation company, and an action cannot be maintained against him to recover a personal judgment therefor.

APPEAL from the district court for Dawson county:
BRUNO O. HOSTETLER, JUDGE. *Affirmed.*

E. A. Cook, for appellant.

W. A. Stewart and *H. M. Sinclair*, *contra.*

HAMER, J.

This is an appeal from the judgment of the district court for Dawson county dismissing the plaintiff's action. A trial was had to the court, and the result was a judgment for the defendant. The plaintiff filed a motion for a new trial upon the ground that the findings and judgment were not supported by sufficient evidence, that they were contrary to the evidence, and that the court erred in dismissing the action.

The plaintiff the Farmers & Merchants Irrigation Company (appellant in this court) commenced an action in the district court for Dawson county against the defendant S. J. Hill to recover a judgment for \$750 and interest for a water maintenance fee for the years 1907, 1908 and 1909. The plaintiff alleged that it owned and operated an irrigation canal and furnished water to lands upon which water rights were held, and that the defendant owned section 5, in township 10 north, of range 21 west, in Dawson county, and that one of the main ditches of the plaintiff passed through said land; that there was attached to said land a water right which was evidenced by a "water-right deed" for 500 acres of said land lying under said ditch, which deed was of record at the time the defendant purchased the land; that in this water-right deed there was a provision which required the payment of 50 cents an acre

as an annual maintenance fee; that the plaintiff was engaged in furnishing water to water users under its said canal; that the land of the defendant was susceptible of irrigation; that no part of said maintenance fee had been paid, and that there was due the plaintiff from the defendant \$750 and interest. The defendant answered that he was the present owner of the land, but denied all the other matters alleged.

Upon the trial the plaintiff offered in evidence the deed for the land described in the petition, together with the indorsements thereon, all of which were received without objection. There was also offered and received in evidence a "water-right deed" containing the covenants upon which plaintiff predicates its right of action. The deed for the land is one of general warranty running from the Nikaniss Company to the defendant, and contains only the ordinary and usual covenants in such a deed. The water-right deed from the plaintiff to the Nikaniss Company contains the following conditions: "That the said party of the first part (The Farmers & Merchants Irrigation Company), for and in consideration of the sum of \$1,750 to it in hand paid, the receipt whereof is hereby acknowledged, and of the further annual payment hereinafter mentioned and provided for, to be made at the times named in this deed, has sold, subject to the limitations and conditions hereinafter named, and by these presents does sell and convey, unto the said party of the second part (Nikaniss Company), and to its heirs, assigns and legal representatives, the right to use water from the canal of the said party of the first part, during the irrigation season of each and every year, in an amount not exceeding the rate of one cubic foot per second of time for each 70 acres of land hereinafter described, to be used upon and for the purpose of irrigating the said land only, the same being situated in the county of Dawson, state of Nebraska, to wit: All that part of section 5, in township 10 north, of range 21 west, lying south of the main canal of the party of the first part (except that part taken up by

slough) containing 500 acres. The said party of the second part, its heirs, assigns and legal representatives agree to pay to the party of the first part, its successors and assigns, as a part of the consideration of this grant, annually in advance, on or before the 1st day of March in each and every year, the further sum of \$250, the same being in addition to the consideration above expressed, and the amount named is hereby agreed upon as a liquidated sum as compensation to the first party for maintaining and operating said canal which it hereby promises and agrees to do, and the said party of the second part agrees to make said payments well and truly, at the times herein named, and it is hereby expressly agreed that in case the *second party* shall fail to make said payments promptly, then the first party may at its election collect said sum or sums with 8 per cent. interest thereon from and after default in payment of the same by suit in law or equity. It is further agreed that, if the first party shall elect to take judgment in a court of law for any sum or sums due on said annual payments, the same shall not be a bar to a suit in equity to foreclose the lien herein given. * * * It is further stipulated and agreed, and this conveyance is made upon the express condition, that if the said party of the second part, its heirs, assigns, shall at any time fail, neglect or refuse to make any of the annual payments hereinbefore provided for at the time the same shall become due and payable, according to the terms hereof, the said first party shall have the election, without notice, to *furnish the supply of water*, and to sue for said annual payment in law or equity, at its election, or upon such default to shut off such supply and to cease to furnish water, under the provisions of this deed, until payment is made of all such defaulted annual payments to the party of the first part, with 8 per cent. interest thereon, from the date of default, until the date of payment, and upon such payment, said second party shall be reinstated, with all the rights and privileges theretofore conferred by this deed, and it is expressly stipulated and

agreed that said second party shall not maintain any suit at law or in equity against the party of the first part, based upon the provisions of this contract, while in default of any of the annual payments hereinbefore referred to, the payment of such annual payments being a condition precedent to the performance on the part of the first party." The deed from the Nikaniss Company to Silas J. Hill is of the date April 6, 1906, and was filed for record May 10, 1906. The "water-right deed" from the Farmers & Merchants Irrigation Company to the Nikaniss Company is of the date February 13, 1904, and was filed for record February 24, 1904.

On the trial it was stipulated that the plaintiff was a corporation, and that the defendant had paid no part of the maintenance fee claimed by plaintiff in the petition; that the defendant owned the land at the time of the commencement of the action, and that he has owned it at all times since he purchased the same. It was also stipulated, for the purposes of the case, that at all times mentioned in the petition the plaintiff has been willing and able to furnish water as provided in the "water-right deed," but that the defendant at all times refused to recognize any rights or liabilities by reason of such deed, and refused to ask for water or to accept water thereunder. It was also agreed that the "water-right deed" was duly indexed against the land therein described at the time the same was filed for record.

It is the contention of the plaintiff that the "water-right deed" attached to the land and passed with the change of title, and that therefore the defendant was liable to pay the maintenance fee for each year as it matured. It is said in plaintiff's brief that, "under the rule established by this court, the water-right deed attached to the land, and cannot be severed from it. The appellee, the owner of the land, is the only person who can receive any benefit from this water right, and he in turn should be held liable to pay the annual maintenance fee." Counsel for the plaintiff contends in his brief: "The sole

question in this case is, can appellant maintain a cause of action against appellee to recover this maintenance fee, there having been no expressed assumption of the obligation in the deed conveying the land to the appellee?" The defendapt contends that he cannot be held personally liable, and the district court adopted that view and dismissed the case.

The question to be determined is whether the defendant has assumed the obligations of the contract entered into between the irrigation company and the Nikaniss Company, the original owners of the land. The defendant bought the land and received a deed, which was in the ordinary form of a warranty deed, and did not mention or refer to the contract sued upon. By the purchase of the land and by receiving the deed, does the defendant assume the contract of his grantor and is he personally charged with the obligations of such grantor? It is argued that section 6825, Ann. St. 1909, obligates the ditch company to keep its canal in repair, and that therefore the duty which the legislature fixes upon the ditch company creates an obligation on its patrons to provide the funds necessary for the performance of the duty. The contract sought to be enforced is executory. The suit brought is *in personam*. It is brought against the person instead of against the thing, and is not a suit against the land to enforce an alleged lien, but it is an action against the defendant, and the theory upon which it is sought to be maintained of necessity would seem to imply the personal promise of the defendant to pay the money. The conveyance made by the Nikaniss Company to the defendant Hill may have transferred to him all the property rights which the Nikaniss Company had in the land conveyed, but if the grantee did not promise in any manner to assume the obligation of his grantor, how can he be bound? The argument of counsel for plaintiff is that "there was no reservation or suggestion of reservation in the deed from the Nikaniss Company to appellee Hill. That deed (exhibit B), it is submitted, carried with it the water

right attached to this land as an appurtenance to the land. The acceptance of the deed by appellee Hill from the Nikaniss Company was an acceptance of all the incidents attached to or belonging to the land transferred to appellee (defendant) and charged him with the conditions written therein." The defendant Hill is a stranger to the original contract made between the Farmers & Merchants Irrigation Company and the Nikaniss Company. If it may be properly said that the defendant Hill received the deed to the land from the Nikaniss Company with notice that the ditch is an easement, and with notice of all the rights of the ditch company (*Arterburn v. Beard*, 86 Neb. 733), and therefore he is charged with such notice, as is said in *Seng v. Payne*, 87 Neb. 812, it would seem that that does not in any way tend to establish the personal liability of the defendant. Counsel for the plaintiff seems to have been unable to find any case directly in point which supports his contention.

We have attempted to carefully examine each of the several irrigation acts passed by the legislature, and in not one of these acts do we find any attempt to charge the grantee of land purchased under an irrigation ditch with the obligation of his grantor to personally pay for the maintenance of the ditch. The first irrigation law passed was approved February 19, 1877, and is entitled "An act to enable corporations formed for the construction and operation of canals for irrigation and other purposes, to acquire right of way, and to declare any such canals works of internal improvement." Laws 1877, p. 168; Comp. St. 1881, ch. 16, secs. 158, 159. The next irrigation act is chapter 68, laws 1889. This was followed by chapter 40, laws 1893. In 1895 a comprehensive irrigation act was passed. Laws 1895, ch. 69. Section 46 of this particular act is the section referred to in appellant's brief as section 6825, Ann. St. 1909. In that section it is said: "It is hereby made the duty of the owner or owners of any such ditch or canal to keep the same in good repair and to cause the water to flow through the said ditch or canal to

the extent of its capacity during the period between April 15 and November 1 each year, *if the same be demanded and the supply at its source be sufficient.*" We call attention to the language of the statute to the effect that the water is only to be furnished by the ditch owner when "the supply at its source be sufficient." In *Crawford Co. v. Hathaway*, 67 Neb. 325, this court held that the act of 1877 was an implied recognition of the right to appropriate the waters of the public domain according to the custom prevailing in the arid states immediately west of us, and that the irrigation acts of 1889 and 1895 expressly recognized and prescribed the rights of those who had appropriated the public waters and applied them to agricultural uses. By section 42, ch. 69, laws 1895 (Comp. St. 1911, ch. 93a, art. II, secs. 42, 43), it is provided: "The water of every natural stream not heretofore appropriated, within the state of Nebraska, is hereby declared to be the property of the public, and is dedicated to the use of the people of the state, subject to appropriation as hereinbefore provided." And in the next section it is said: "The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied." These sections would seem to make the water in the natural streams of the state the property of the public; that is, the property of the state, subject however to appropriation for beneficial uses. This would seem to be specifically said by Judge SEDGWICK in *Castle Rock Irrigation Canal & Water Power Co. v. Jurisch*, 67 Neb. 377. Section 6924x², Ann. St. 1911, provides: "Irrigation works constructed under the laws of this state are hereby declared to be common carriers." The further provision contained in the section is: "The owner or operator of any works for the storage, carriage, or diversion of water except irrigation districts must deliver all water legally appropriated to the parties entitled to the use of the water for beneficial purposes, at a reasonable rate, to be fixed by the state railway commission, according to the law in such cases relating to common carriers."

From the statutes and decisions referred to it would seem that the waters in the running streams of the state are public property, subject to be diverted and applied for beneficial uses. That ditches may be constructed to carry the water to agricultural lands for a reasonable compensation would seem proper, and the owner of the land may undoubtedly obligate himself to assist in the construction and maintenance of the ditch. If the owner of the land after incurring an obligation of this kind sells and conveys it, is there any obligation upon the part of his grantee to keep up a maintenance fee, although he has not undertaken to do so by any personal promise?

We think that the following authorities tend to show that the defendant is not personally liable, and some of these decisions perhaps tend to show that he is not liable as grantee for any burden unless he and the plaintiff in the case are privies in estate: 17 Viner, Abridgment of Law and Equity (Privy), p. 534; 2 Bouvier, Law Dictionary; *Hurd v. Curtis*, 19 Pick. (Mass.) 459; *Educational Society v. Varney*, 54 N. H. 376; 2 Washburn, Real Property (6th ed.) secs. 1203-1205; *Cole v. Hughes*, 54 N. Y. 444; *Scott v. McMillan*, 76 N. Y. 141; *Nesbit v. Nesbit*, 1 Taylor (N. Car.) 403 (318); *Webb v. Russell*, 3 T. R. (Eng.) 393; *Keppell v. Bailey*, 2 Myl. & K. (Eng.) 517; 4 Kent, Commentaries, *473; *Mygatt v. Coe*, 124 N. Y. 212; *Pool v. Morris*, 29 Ga. 374; *Patton v. Pitts*, 80 Ala. 373; *Kettle River R. Co. v. Eastern R. Co.*, 41 Minn. 461; *Bloch v. Isham*, 28 Ind. 37; *Weld v. Nichols*, 17 Pick. (Mass.) 538; *Bally v. Wells*, 3 Wils. (Eng.) 25.

In *Fresno Canal & Irrigation Co. v. Rowell*, 22 Pac. 53 (80 Cal. 114), it was held: "Where a grantee of the covenantor had notice of the water right when he purchased the land, but did not know its terms, such knowledge was sufficient to put him upon inquiry, and a failure to do so will not relieve him of the obligation upon the land." In the same case it was held: "Under civil code, Cal., secs. 1460-1462, specifying what covenants run with the land, the covenants under the contract in question do not run

with the land, not being contained in the grant of the estate, and no personal judgment can be had against defendant; but the lien must be foreclosed against the land, he not being a *bona fide* purchaser without notice of the lien." An examination of the civil code of California shows that proceedings against the land by foreclosure of the alleged lien are dependent upon the code of that state. Civil code of California, sections 1460, 1462, 2882, 2884. It will be seen from the foregoing California case that, although the statutes of that state make the lien created by the contract follow the land, yet the court said: "There can be no judgment against the defendant personally for money, but the lien can be enforced by foreclosure against the land, and every grantee who is not a *bona fide* purchaser without notice."

Counsel for the plaintiff cites *Farmers Canal Co. v. Frank*, 72 Neb. 136. We think that case cannot properly be applied to the consideration of this one. It required in its determination the consideration of section 6782, Ann. St. 1903. It was a consideration of the statement required in an application to the state board of irrigation for a permit to appropriate water. This court held that it was necessary to state in such application a description of the land to be irrigated. The thing determined was not whether there was a personal liability for the maintenance of a ditch. It was merely directory concerning the method of appropriating water for irrigation purposes. If A purchases a tract of land upon which there is a mortgage, he does not necessarily assume payment of the mortgage, nor does he become liable in an action at law upon the original note which the mortgage secures. Of course, if he does not pay the note and thereby satisfy the mortgage, he may lose his title to the land by foreclosure. Notwithstanding the fact that he may lose the land, he does not become personally liable upon the note. This is so plain that the citation of any authority would seem to be unnecessary. In *Lexington Bank v. Salling*, 66 Neb. 180, it is held that the conveyance of land subject to out-

standing incumbrances imposes upon the purchaser no obligation to pay such incumbrances. In discussing the case the court said: "It has long been settled in this state that the acceptance of a deed which in express terms conveys land subject to an incumbrance does not impose upon the grantee a personal obligation to pay the debt. He is in such case interested in discharging the incumbrance, but he owes neither the grantor nor the incumbrancer any duty arising *ex contractu*. The transaction being nothing more than the purchase of an equity of redemption, no implied agreement is deducible from it."

We approach the determination of this case with a full realization of the importance of irrigation to the state. While the great bulk of farming in Nebraska is done upon agricultural lands which are not irrigated, yet a very considerable section must always depend upon the successful application of water to agricultural uses. This section of our state is already prosperous and is destined to support a dense population. Irrigation is to be encouraged and protected in every legitimate way.

While the plaintiff may be obliged to furnish the defendant with water for irrigation purposes, if he demands it, and the plaintiff has it, yet the refusal of the defendant to accept the water does not create a personal liability against the defendant.

It is contended by the plaintiff that the maintenance fee is by the terms of the "water-right deed" made a charge upon the land, and that the defendant by his purchase of the land became personally liable for the payment of such maintenance fee. The trouble with this contention is that neither the terms of his deed nor the several irrigation acts impose upon him any such personal liability. We are of opinion that the trial court correctly determined the question before it.

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2. That contract for sale of land was canceled by mutual consent of vendor and vendee *held* not to affect agent's right to recover commission. *Reasoner v. Yates* 757
3. General agent *held* liable to subagent for commission, though owner of land refuses to ratify sale or is unable to convey good title. *Reasoner v. Yates* 757
4. In action by agent against owner for commission, where sale was not completed because owner could not furnish good title, *held* not essential to recovery that owner had represented that his title was good. *Reasoner v. Yates*..... 757
5. Sec. 10856, Ann. St. 1911, requiring contracts between owners of land and brokers to be in writing, *held* not to apply to a contract between agent and subagent for a specific commission. *Reasoner v. Yates* 757

Burglary.

- In a prosecution for burglary, evidence *held* to show malice, and breaking and entering. *Kempton v. State*..... 655

Carriers. See RAILROADS. STREET RAILWAYS, 3.

1. In an action for injury to live stock in transit, evidence *held* to support verdict for plaintiffs. *Modesitt v. St. Joseph & G. I. R. Co.* 133
2. Petition *held* to state a cause of action against carrier for loss of suit case. *O'Grady v. Chicago, B. & Q. R. Co.*..... 339
3. Evidence in action for injury to elevator passenger *held* to sustain verdict for plaintiff. *Wagner v. Farmers & Merchants Ins. Co.* 463
4. Instruction in action for injury to elevator passenger *held*

Carriers—Concluded.

- not erroneous as assuming that defendant was negligent.
Wagner v. Farmers & Merchants Ins. Co. 463
5. In action for death of passenger, refusal of certain requested instruction *held* error. *Shanahan v. Chicago, B. & Q. R. Co.*, 637

Chattel Mortgages.

1. Where possession of property remains with mortgagor, and the mortgage, or a copy thereof, is not filed as required by sec. 14, ch. 32, Comp. St. 1893, the mortgage is void as to creditors, irrespective of notice. *Rothchild & Co. v. Van Alstine* 441
2. Purchaser at attachment sale, without notice of an unfilled mortgage, takes the property discharged of the mortgage lien. *Rothchild & Co. v. Van Alstine* 441

Commerce. See RAILROADS, 4. WATERS, 5.

Constitutional Law. See INTOXICATING LIQUORS, 1. STREET RAILWAYS, 1, 2. TAXATION, 9.

- Ch. 147, laws 1909, amending ch. 161, laws 1905, by which certain provisions relating to claims for damages in connection with drainage assessments were omitted therefrom, *held* not in violation of sec. 21, art. I of the constitution. *Nemaha Valley Drainage District v. Marconnit*..... 514

Contracts. See INSURANCE, 5, 6.

1. All parts of the transaction will be considered to ascertain whether a consideration sustains a contract. *Bennett v. Baum* 320
2. Where a written contract requires extrinsic evidence to explain it, interpretation is a question of fact. *Sabin v. Cameron* 347
3. In absence of latent ambiguity, interpretation of a written contract is for the court. *Sabin v. Cameron*..... 347
4. A builder who does extra work by request *held* entitled to compensation therefor. *Sabin v. Cameron*..... 347
5. Whether an instrument is an agreement to enter into a lease or a lease must be ascertained from its terms in the light of surrounding circumstances. *Schultz v. Hastings Lodge* 454
6. An agreement in writing *held* to be a contract for a lease, and not a lease. *Schultz v. Hastings Lodge*..... 454
7. A contract for a lease *held* not to create an interest in real estate therein described. *Schultz v. Hastings Lodge*..... 454
8. For breach of contract to lease, the expectant tenant may maintain an action for damages, or for specific performance. *Schultz v. Hastings Lodge*..... 454

Contracts—Concluded.

9. Mutual rights of parties to a contract for a lease may be waived by oral declarations and acts of the parties. *Schultz v. Hastings Lodge* 454
10. In action on subscription to pay one-fourth of cost of the nave of a church, plaintiff *held* entitled to prove that defendant was estopped by conduct from urging the defense that the entire building was constructed at one time, instead of the nave alone. *Lowe v. Keens* 565
11. Evidence of builders and contractors as to cost of nave constructed with other parts of a church *held* admissible in action on subscription for construction of the nave. *Lowe v. Keens* 565
12. Contract between adult man and woman that, if she will act as his housekeeper, he will support her and leave her his estate, *held* not against public policy. *Goff v. Supreme Lodge Royal Achates* 578
13. Private seals having been abolished by secs. 11850, 11851, Ann. St. 1911, all contracts are upon the same footing as simple contracts. *Montgomery v. Dresher* 632

Corporations. See DRAINS, 12, 14, 16. INJUNCTION. INSURANCE, 1, 2. SALES, 8. STATUTE OF FRAUDS, 1. STREET RAILWAYS.

1. Corporation retaining benefit of transaction induced by fraud of agent *held* liable to injured party. *First Nat. Bank v. Exchange Bank*..... 225
2. Power of corporation to increase its capital stock is a trust, and must be so exercised that every stockholder may subscribe for the increased issue in proportion to his prior holding. *Bennett v. Baum* 320
3. Where all stockholders of a corporation and the corporation are before a court, and rights of third persons will not be prejudiced, rules of equitable estoppel will be applied to prevent injustice. *Bennett v. Baum*..... 320
4. Stockholder accepting stock in corporation reorganized on account of defect in original incorporation *held* estopped to assert that the first one is legal and the subsequent one illegal. *Bennett v. Baum* 320
5. A defendant who relies on failure of nonresident corporation to comply with ch. 16, Comp. St. 1907, must plead and prove facts showing noncompliance therewith. *Armsby Co. v. Raymond Bros.-Clarke Co.*..... 553

Costs. See INTOXICATING LIQUORS, 15.

Allowance of costs against the corporation, in suit by stockholders for an accounting, approved. *Bennett v. Baum*.... 320

Counties and County Officers. See BRIDGES. DRAINS, 17-20.

1. A county treasurer who receives anything of value for the use of county funds is liable on his bond for the profit. *Furnas County v. Evans* 37
2. Petition in an action on county treasurer's bond for receiving interest on county funds after enactment of ch. 50, laws 1891, *held* to state a cause of action. *Furnas County v. Evans* 37
3. Where a county collected a bridge fund and made a contract for a bridge, and thereafter a new county was organized out of that part of the county in which the bridge was to be constructed, *held* that the former county could not abrogate the contract without the consent of the new county. *Western Bridge & Construction Co. v. Cheyenne County* 748
4. County *held* liable for bridge, constructed in a new county organized from territory of the former, to amount of taxes previously collected for its construction. *Western Bridge & Construction Co. v. Cheyenne County* 748
5. Where a county was divided, and in the division of property under sec. 16, art. I, ch. 18, Comp. St. 1911, the new county was entitled to one-third of a bridge fund in the treasury of the former county, *held* that the former county could apply the fund in part payment of a bridge constructed in the new county. *Western Bridge & Construction Co. v. Cheyenne County* 748

Criminal Law. See BURGLARY. HOMICIDE. INDICTMENT AND INFORMATION. LARCENY.

1. Under sec. 436 of the criminal code, *held* error to require accused to immediately proceed with trial, without arraignment, after amendment of void information. *McKay v. State* 63
2. One accused of felony *held* not placed in jeopardy a second time by being forced to proceed with trial immediately on amendment of void information. *McKay v. State*..... 63
3. Under sec. 20, ch. 7, Comp. St. 1911, private counsel *held* permitted to assist in prosecution for felony only when procured by the county attorney under direction of the district court. *McKay v. State* 63
4. Order by district court, at opening of trial, permitting attorney appearing as private prosecutor to assist in the prosecution, *held* not a compliance with the statute. *McKay v. State* 63
5. Overruling of timely objection to participation of private counsel in prosecution for felony *held* error. *McKay v. State* 63

Criminal Law—Continued.

6. One accused of a crime *held* entitled to trial upon competent, relevant evidence. *McKay v. State* 63
7. Rule calling for instruction as to weight of testimony of informers, detectives, or other persons employed to hunt up testimony against accused, *held* not to apply to county attorney, sheriff, or deputy. *Keezer v. State* 238
8. Death of party convicted of felony, pending error proceedings, *held* to abate the proceedings. *Stanisics v. State* ... 278
9. Jurors should consider all the evidence bearing on mental capacity of accused, and should not be instructed to only consider opinions of experts. *Davis v. State*..... 361
10. Where there is evidence to impair the presumption that accused was sane, the state must prove beyond all reasonable doubt that he was mentally competent. *Davis v. State*.... 361
11. An erroneous instruction is not cured by another contradicting it. *Davis v. State* 361
12. In a prosecution for murder in the first degree, *held* not reversible error to instruct on different grades of homicide, including murder in the first degree, though that charge is afterwards withdrawn and the case submitted on charges of murder in the second degree and manslaughter. *Flege v. State* 390
13. Request for instruction that evidence of good character may be relied on to raise a doubt of defendant's guilt sufficient to acquit him *held* properly denied. *Flege v. State* 390
14. Presumption of innocence of accused continues until overcome by evidence establishing guilt beyond a reasonable doubt. *Flege v. State* 390
15. Rulings on exclusion of evidence considered. *Flege v. State* 390
16. In a prosecution for murder, when the circumstances of the killing are proved, instruction that the law implies malice therefrom *held* erroneous. *Flege v. State* 390
17. Instruction as to the circumstances under which the law will imply malice *held* to have no application to the evidence. *Flege v. State* 390
18. Instructions attempting to define "reasonable doubt" *held* erroneous and prejudicial. *Flege v. State*..... 390
19. When time of murder is in dispute, but there is no question as to whereabouts of defendant at any time, *held* error to instruct that defendant relies on proof of alibi. *Flege v. State* 390
20. Instruction that, if contradictory statements were made at former hearing through an honest fear of personal violence,

Criminal Law—Concluded.

- they would not operate as impeaching statements, *held* erroneous. *Flege v. State* 390
21. Instruction defining motive for crime should explain its application to the case in hand. *Flege v. State*..... 390
22. Instruction referring to "the pistol-shot wounds inflicted by the defendant" *held* incorrect, as assuming that defendant inflicted the wounds. *Flege v. State* 390
23. In a criminal prosecution, based on the explosive quality of a substance, the utmost care should be taken in preserving it and its identity. *Erdman v. State* 642
24. In prosecution for assault with intent to murder, evidence as to the procuring of dynamite by accused *held* too remote and of no probative force. *Erdman v. State* 642
25. In prosecution for assault with intent to murder, certain evidence *held* immaterial, irrelevant, and prejudicial. *Erdman v. State* 642
26. Reading by state's attorney of written statement by a witness conflicting with her testimony, after she testified she had concluded the statement was erroneous, *held* error. *Erdman v. State* 642
27. Indorsement of name of additional witness on information after three jurors had been called *held* not prejudicial. *Kemplin v. State* 655
28. Where a court has fully charged as to the law applicable to the facts, it is not required to give additional instructions. *Graham v. State* 658
29. If the record contains competent evidence to sustain charge of wife abandonment, verdict will not be set aside. *Graham v. State* 658
30. Limitation of time of argument *held* not ground of reversal, where no abuse of discretion is shown. *Graham v. State*.. 658
- Crops.** See LIMITATION OF ACTIONS, 4. PLEADING, 12. WATERS, 9.
- Customs and Usages.**
- Evidence *held* sufficient to establish a custom. *Glantz v. Chicago, B. & Q. R. Co.*..... 606
- Damages.** See ASSAULT AND BATTERY. EMINENT DOMAIN, 3. INTOXICATING LIQUORS, 13-15. LANDLORD AND TENANT. LIBEL AND SLANDER, 1, 3. PHYSICIANS AND SURGEONS, 4. SALES, 3, 4, 8-10.
1. In an action for injury to realty and for conversion of personalty, *held* error to permit plaintiff to show the entire damage by evidence as to the value of the farm before and after the injury and conversion. *Wenger v. Steffens*..... 51

Damages—Concluded.

2. In action for death, verdict for \$5,450 *held* not so excessive as to require a reversal. *O'Grady v. Union Stock Yards Co.*, 138
3. Verdict for \$3,000 damages for personal injury *held* not excessive. *Neice v. Farmers Co-Operative Creamery & Supply Co.* 470
4. In action for damages, if evidence shows that plaintiff was damaged in at least the amount found, judgment will not be reversed because exact amount is not definitely shown. *Steinke v. Dobson* 616

Deeds. See MORTGAGES, 5, 11. WATERS, 10. WILLS, 15.

1. Delivery of deed by grantor to third person to be delivered to grantee *held* equivalent to delivery to grantee. *Haas v. Wellner* 160
2. Covenant in deed against incumbrances is not broken by grantor's nonpayment of taxes which are not a lien until after deed is delivered. *Taylor v. Harvey* 562
3. In a contest between heirs of the whole blood and of the half-blood of intestate, parol evidence *held* admissible to prove that the sole consideration for a deed to intestate from his mother was love and affection, notwithstanding the sole recital of a consideration is a substantial, valuable consideration. *Harman v. Fisher* 688

Depositions.

- Objection to deposition for defect in the certificate will not be considered unless in writing and filed before trial. *Essex v. Ksenky* 437

Descent and Distribution. See DEEDS, 3. TAXATION, 9-13.**Devises.** See WILLS, 2-4.**Divorce.** See HUSBAND AND WIFE.

1. In suit for divorce, where neither party was blameless, decree dismissing petition and cross-petition affirmed. *Goings v. Goings* 148
2. In suit by wife for absolute divorce, in which defendant seeks a similar decree, whether such decree should be granted to either party, or a decree from bed and board granted to the wife, *held* within the discretion of the court. *Goings v. Goings* 148
3. On decree of divorce from bed and board, where property has been accumulated by the joint efforts of husband and wife, provision will be made for maintenance of wife. *Goings v. Goings* 148
4. Though false accusations of marital infidelity may constitute extreme cruelty, whether divorce should be granted on that ground depends upon the facts of the case. *Votaw v. Votaw*, 699

Domicile.

Facts stated *held* to show change of residence. *Whitford v. Kinzel* 573

Drains. See CONSTITUTIONAL LAW. WATERS, 9.

1. Under ch. 153, laws 1907, implied authority *held* given to apportion to highways within a drainage district their due proportion of the cost of drainage. *Cuming County v. Bancroft Drainage District* 81
2. That units of cost of drainage are apportioned to a whole road, instead of to the portion benefited, *held* not to render the apportionment void, if limited to actual benefits. *Cuming County v. Bancroft Drainage District* 81
3. School lands sold by the state under contract are properly included in a drainage district, and assessable for benefits; but, if sold for such special assessments, sec. 223, ch. 77, art. I, Comp. St. 1911, applies, and the rights of the state in the land are not affected thereby. *Morehouse v. Elkhorn River Drainage District* 406
4. In levying drainage assessment, land taken for right of way of ditch *held* not assessable to owner from whom it is taken. *Nemaha Valley Drainage District v. Stocker* 507
5. Drainage assessment upheld, where the improvement specially benefited each tract as a whole, though portions were not susceptible of cultivation. *Nemaha Valley Drainage District v. Stocker* 507
6. Evidence *held* to sustain judgment determining drainage assessment. *Nemaha Valley Drainage District v. Skeen*... 510
7. To sustain a drainage assessment under ch. 161, laws 1905, the levy need not be confined to the portion of a tract liable to be covered with water in times of flood. *Nemaha Valley Drainage District v. Higgins* 513
8. Jurisdiction is conferred on the district court on appeal from a drainage assessment under ch. 161, laws 1905, by filing a transcript of the hearing with the clerk of the court. *Nemaha Valley Drainage District v. Marconnit* 514
9. That some of the laterals in a general scheme of drainage do not directly benefit a landowner will not relieve his land of its fair proportion of the common burden. *Nemaha Valley Drainage District v. Marconnit* 514
10. That an exact measurement of benefits to lands in a drainage district cannot be made in advance does not render the damages speculative. *Nemaha Valley Drainage District v. Marconnit* 514
11. On appeal from drainage assessment, evidence *held* to sustain findings and decree. *Nemaha Valley Drainage District v. Marconnit* 514

Drains—Concluded.

12. In the taking or damaging of private property by a drainage district corporation, the same principles apply as to damages as in exercise of right of eminent domain for other purposes. *Nemaha Valley Drainage District v. Marconnit*.. 514
13. A landowner may sue to recover actual pecuniary loss sustained by reason of construction of drains. *Nemaha Valley Drainage District v. Marconnit* 514
14. A drainage district corporation founded under ch. 161, laws 1905, by the terms of sec. 37 is a body politic and corporate, and may sue and be sued. *Nemaha Valley Drainage District v. Marconnit* 514
15. A topographical survey, maps, and profiles for a drainage district, made by an engineer in conformity to ch. 161, laws 1905, and filed January, 1909, *held* sufficient to vest the board of supervisors with jurisdiction. *Nemaha Valley Drainage District v. Marconnit* 514
16. One signing articles of incorporation for formation of drainage district under ch. 161, laws 1905, cannot limit the powers of the corporation by expressions in petition for formation of the district. *Nemaha Valley Drainage District v. Marconnit* 514
17. Official employment of drainage engineer by county board, under sec. 5506, laws 1903, *held* to relate back to beginning of work under oral direction of members of board. *Holmwig v. Dakota County*..... 576
18. Where a county board, after having established a ditch and employed an engineer, under secs. 5500, 5506, Ann. St. 1903, subsequently rescinds its action establishing the ditch without notice to the engineer, he will be entitled to reasonable compensation for subsequent services and expenses. *Holmwig v. Dakota County*..... 576
19. County, and not petitioners for ditch improvement, *held* liable for services of engineer. *Holmwig v. Dakota County*, 576
20. Under ch. 89, Comp. St. 1907, county authorities must keep the channel of a county ditch free from obstructions. *Gray v. Chicago, St. P., M. & O. R. Co.*..... 795

Ejectment. See EXECUTORS AND ADMINISTRATORS.

1. Probate record of foreign-probated will admitted to probate in Nebraska *held* admissible in evidence in ejectment by administrator of estate of devisee. *Tilson v. Holloway* 481
2. Where defendant in ejectment pleads, and offers evidence tending to prove, purchase of land in dispute from testator, under whose will plaintiff claims, *held* error not to determine the issue. *Tilson v. Holloway* 481

Elections.

In election contest, ballots and other records of the election sufficiently identified *held* not to be excluded because of negligence of officers in caring for them. *State v. Barr*.... 766

Eminent Domain. See CONSTITUTIONAL LAW. DRAINS, 12, 13.

1. Petition *held* not to sufficiently allege that plaintiff's property had been damaged by erection of standpipe by city. *Bonge v. Village of Winnetoon* 260
2. Petition for damages from erection of standpipe *held* to allege a simple trespass by officers, for which city would not be liable. *Bonge v. Village of Winnetoon* 260
3. Where a carrier by condemnation acquired the right to maintain tracks for storage of cars on certain streets in city of South Omaha, the city *held* entitled to substantial damages, in view of sec. 20, art. II, ch. 13, Comp. St. 1901. *City of South Omaha v. Omaha B. & T. R. Co.*..... 527

Equity. See PLEADING, 13. RECEIVERS. TRUSTS, 1.

Sec. 106 of the code, requiring that cross-demands compensate each other, *held* to apply in equity. *Taylor v. Harvey*.... 770

Estoppel. See APPEAL AND ERROR, 11. CORPORATIONS, 3, 4. GUARDIAN AND WARD.

1. Mere delay by the state in asserting title to a disputed tract of school land *held* not to bar its right to quiet title thereto. *State v. Ball* 307
2. Unauthorized acts of taxing officers in collecting taxes on school lands *held* not to estop the state from asserting its title thereto. *State v. Ball*..... 307

Evidence. See APPEAL AND ERROR. BASTARDY, 2, 4. BOUNDARIES.

CONTRACTS, 10, 11. CRIMINAL LAW. DEEDS, 3. DEPOSITIONS. EJECTMENT, 1. ELECTIONS. INSURANCE, 14-16. JUDGMENT, 1, 2, 14, 15. LIMITATION OF ACTIONS, 1, 3. MASTER AND SERVANT, 2-4. MORTGAGES, 3, 4, 7, 10. MUNICIPAL CORPORATIONS, 2, 3. PRINCIPAL AND AGENT, 1. QUO WARRANTO, 3. REPLEVIN, 1, 2. SALES, 1, 6, 7, 13. TRIAL, 5, 13. WILLS, 12, 14. WITNESSES.

1. Where the evidence as to an issue of fact in an equity suit is conflicting, the finding should be in favor of the party whose proofs are the more convincing. *Anderson v. Noleman* 53
2. It will be presumed that a husband knew the age of his wife, with whom he had lived for 30 years. *Adler v. Royal Neighbors of America* 56
3. Parol evidence is admissible to prove that indorsement on note when executed is a substantive part of the note. *Doll v. Getzschmann* 370

Evidence—Concluded.

4. A note or other contract in writing cannot be varied or contradicted by parol evidence. *First Nat. Bank v. Burney*, 432
5. Account kept by tradesman in loose-leaf ledger, shown to be book of original entries, and verified as required by sec. 346 of the code, *held* admissible in evidence as a book account. *Armstrong Clothing Co. v. Boggs*..... 499
6. Under sec. 420 of the code, reports of decisions of supreme court of Missouri *held* properly admitted in evidence to prove the law of that state. *Steinke v. Dobson* 616
7. Evidence *held* to show proper foundation for admission of copy of letter in evidence. *Reasoner v. Yates* 757
8. It will not be presumed that documents in evidence were not sufficiently identified, unless that fact appears from the abstract. *State v. Barr* 766
9. In action for injury to crops from flooding, certain letters *held* to afford no evidence of ratification of promise to remove obstructions from watercourse. *Gray v. Chicago, St. P., M. & O. R. Co.*..... 795

Exceptions, Bill of.

- A referee has sole authority to settle and allow a bill of exceptions of the evidence adduced during trial before him. *Bennett v. Baum* 320

Executors and Administrators.

- Under sec. 202, ch. 23, Comp. St. 1911, an executor or administrator has the right to possession of decedent's real estate, and may maintain ejectment therefor. *Tillson v. Holloway* 481

Forcible Entry and Detainer.

1. Sec. 1022 of the code, relating to notice as a condition precedent to an action of forcible entry and detainer, *held* to confer on a tenant a right which he may rest upon or waive. *Dorrington v. Sowles* 587
2. In forcible entry and detainer, objection to notice upon other grounds alone, *held* a waiver of insufficiency of time of notice. *Dorrington v. Sowles* 587

Fraud. See INSANE PERSONS, 3. MORTGAGES, 8. SALES, 1, 2. STREET RAILWAYS, 6. VENDOR AND PURCHASER, 2.

- A person is justified in relying on a representation made as a statement of fact, where an investigation would be required to discover the truth. *Martin v. Hutton* 34

Fraudulent Conveyances.

- Sec. 6048, Ann. St. 1909, commonly called "Bulk Sales Law," *held* not to apply to fixtures or manufacturer's stock of raw materials used by himself, and not offered for sale in ordinary course of trade. *Lee v. Gillen & Boney* 730

Guardian and Ward. See **INSANE PERSONS.**

Final settlement between guardian and ward, after ward's majority, in which he received his share of proceeds of sale of land, *held* to estop the ward from questioning the validity of the sale. *Kulp v. Heimann* 167

Hawkers and Peddlers.

A grocer taking orders for goods and delivering them by wagon *held* not a hawker under an ordinance imposing a license tax. *Village of Scribner v. Mohr* 21

Highways. See **DRAINS**, 1, 2.

1. Rule stated as to rights of persons driving in the same direction in a public road, and seeking to pass each other, prior to enactment of sec. 147, ch. 78, Comp. St. 1911. *Hackett v. Alamito Sanitary Dairy Co.* 200
2. A traveler in a street must use it in such manner as not unreasonably to deprive others of their equal rights. *Hackett v. Alamito Sanitary Dairy Co.* 200
3. In an action for injuries from collision in a street, question whether defendant or his servants were guilty of negligence, or plaintiff of contributory negligence, *held* ordinarily for jury. *Hackett v. Alamito Sanitary Dairy Co.* 200

Homestead.

Removal by husband and wife from the state *held* to constitute an abandonment of homestead, so that the husband could convey by his individual deed. *Whitford v. Kinzel*... 573

Homicide. See **CRIMINAL LAW**, 12, 16-19, 24, 25.

1. In charging murder while attempting to perpetrate robbery, *held* not necessary to allege that the act was committed deliberately and with premeditation. *Keezer v. State*..... 238
2. Under an indictment for murder while attempting to commit robbery, premeditation and deliberation need not be proved separately. *Keezer v. State* 238
3. In a prosecution for murder, jury *held* justified in finding that the victim was assaulted with intent to rob. *Keezer v. State* 238
4. Where the court charged that accused were presumed to be innocent, *held* that they were not entitled to further instruction that the presumption was that they had no intent to rob the victim. *Keezer v. State* 238
5. In homicide, the law implies malice if the killing alone is shown. *Davis v. State* 361
6. Where the circumstances attending a homicide are fully testified to by eye-witnesses, it is error to charge that there is a presumption of malice from the fact of the killing. *Davis v. State* 361

Husband and Wife. See DIVORCE, 3.

1. In suit by wife for separate maintenance, the court may at any time during its pendency make her an allowance for suit money, including attorney's fees. *Kiddle v. Kiddle*, 248
2. "During pendency of suit" defined. *Kiddle v. Kiddle*..... 248
3. Reconciliation of parties pending suit for maintenance held not to oust the court of authority to make allowance of attorney's fees. *Kiddle v. Kiddle*..... 248
4. Reconciliation and renewal of cohabitation will abrogate articles of separation executed by husband and wife. *Gaster v. Estate of Gaster* 529

Indictment and Information. See HOMICIDE, 1, 2.

- An information is fatally defective if it charges offense subsequent to date on which information is filed, or on an otherwise impossible date. *McKay v. State* 63

Injunction. See JUDGMENT, 3, 4. NUISANCE. WATERS, 1-3.

1. A city will be restrained from interfering with the business of a corporation by destroying its property without compensation, after recognition of its rights for many years. *Omaha & C. B. Street R. Co. v. City of Omaha*..... 6
2. An injunction against a city's interference with the business of a street railway company will be limited to the duration of the company's franchise. *Omaha & C. B. Street R. Co. v. City of Omaha* 6
3. Injunction will not lie when there is an adequate remedy at law. *Powers v. Flansburg* 467

Insane Persons. See WILLS, 5, 6.

1. Husband appointed guardian of insane wife's estate will not be permitted to use her property or his position for his advantage or to her detriment. *Wilson v. Wilson*..... 353
2. Guardian of insane ward should apply for direction, where he holds funds and a threatened foreclosure of mortgage may result in the sacrifice of the ward's dower and homestead interests. *Wilson v. Wilson* 353
3. Where husband and guardian of insane woman purchases at judicial sale real estate wherein she has dower and homestead estates, upon becoming sane she may hold him as trustee, without regard to whether there was active fraud. *Wilson v. Wilson*..... 353
4. Where the court appoints a guardian *ad litem* for an insane woman who has dower and homestead estates in land in foreclosure, the general guardian will not be liable in damages for failure to protect her interests. *Wilson v. Wilson* 353
5. Liability of guardian for use of ward's funds stated. *Wilson v. Wilson* 353

Insurance.

1. Insurance companies held not required to file statement with attorney general under sec. 4, ch. 162, laws 1905. *State v. American Surety Co.* 154
2. Insurance companies held not engaged in "trade" or "commerce" within title of ch. 162, laws 1905. *State v. American Surety Co.*..... 154
3. In a suit by attorney general on information of auditor under sec. 28, ch. 43, Comp. St. 1911, the court may, after decree for dissolution of insolvent insurance corporation, appoint a receiver to close its business under sec. 266 of the code. *State v. Farmers & Merchants Ins. Co.*..... 664
4. Power to bring suit by attorney general to dissolve insolvent insurance company depends on statute; but, after decree, the court may appoint a receiver to wind up its affairs, rather than permit the business to be closed by its officers as trustees under secs. 62-66, ch. 16, Comp. St. 1911. *State v. Farmers & Merchants Ins. Co.*..... 664
5. Insurance policy held to be a Nebraska contract. *Haas v. Mutual Life Ins. Co.*..... 808
6. Whether or not insurance contract was abandoned held to be question for jury. *Haas v. Mutual Life Ins. Co.*..... 808
7. Where insurer held a reserve on a policy sufficient to pay premiums until after death of insured, and there was no forfeiture clause in the policy, held that the insurance was in force at time of death. *Haas v. Mutual Life Ins. Co.*.... 808
8. Incontestable clause in policy held not to apply to defense of forfeiture by nonpayment of premiums, or to abandonment of contract. *Haas v. Mutual Life Ins. Co.*..... 808
9. There being no forfeiture clause in policy, insured held not bound to exercise certain options, but that he had the right to have the reserve applied to payment of premiums. *Haas v. Mutual Life Ins. Co.*..... 808
10. Where a beneficiary forfeits his membership in a benefit association by engaging in a prohibited occupation, assurer held not to assume the hazards thereof by accepting dues on condition that insurance shall extend only to original risks. *Pendergast v. Royal Highlanders* 117
11. In construing a contract of insurance in a beneficial association, a statement in the application will be construed a warranty only when it clearly appears that such was the intention of the parties. *Goff v. Supreme Lodge Royal Achates* 578
12. That statements in application shall constitute defense to action on benefit certificate, the association must plead and

Insurance—Concluded.

- prove that they were false in a material matter, and that the association relied thereon. *Goff v. Supreme Lodge Royal Achates* 578
13. Housekeeper for member of fraternal beneficiary association held a dependent, eligible as his beneficiary. *Goff v. Supreme Lodge Royal Achates* 578
14. To prove defense of suicide, the evidence must clearly point to conclusion of suicide, and to exclusion of all reasonable probability of death by accident or from natural causes. *Schrader v. Modern Brotherhood of America*..... 683
15. In action on life insurance policy, burden is on defendant to prove defense of suicide. *Schrader v. Modern Brotherhood of America* 683
16. Evidence in action on policy held to sustain verdict for plaintiff as against defense of suicide. *Schrader v. Modern Brotherhood of America* 683

Intoxicating Liquors.

1. Sec. 15, ch. 50, Comp. St. 1881, substantially re-enacting sec. 340 of the criminal code of 1866, relating to civil damages resulting from sale of liquors, held constitutional. *Smith v. Roehrig* 262
2. In action for damages from assault, resulting from sale of liquors to assaillants, evidence held to support verdict for plaintiff. *Smith v. Roehrig*..... 262
3. A village board has no authority to permit the transfer of a license to sell intoxicating liquors. *In re Shue*..... 288
4. Two weeks' notice of filing petition for license to sell liquors is essential to jurisdiction to grant license. *Maxwell v. Reisdorf* 374
5. A new notice must be given where full number of qualified petitioners first appear on petition at time set for hearing of remonstrance. *Maxwell v. Reisdorf* 374
6. Record of village board granting license to sell liquors must show all jurisdictional facts. *Maxwell v. Reisdorf* 374
7. Filing of petition signed by required number of resident freeholders is essential to grant of license for sale of liquors. *Maxwell v. Reisdorf* 374
8. Signer of petition for liquor license, who purchased property and occupied it as a home, held a freeholder, though he received no deed therefor until he signed petition for liquor license. *Shank v. Lee* 732
9. Where several witnesses testify in a general way that applicant for liquor license is a man of good moral character, and there is no evidence to the contrary, a finding for applicant will not be reversed. *Shank v. Lee* 732

Intoxicating Liquors—Concluded.

10. Evidence *held* insufficient to show that applicant for liquor license had violated statute regulating sale of intoxicating liquors within the year prior to application. *Shank v. Lee*, 732
11. Applicant for liquor license *held* not a proper person to procure a license. *In re Shue* 288
12. A bartender who has sold liquor to minors within a year prior to his application *held* not a proper person to receive a liquor license. *In re Sokol* 290
13. Judgment for damages from sale of liquors will not be set aside as not supported by the evidence and excessive, unless clearly wrong. *Essex v. Ksensky* 437
14. Evidence *held* to sustain verdict for \$2,000. *Essex v. Ksensky* 437
15. In action for damages on saloon-keeper's bond, where the verdict was less than \$200, each party *held* to pay his own costs. *Deck v. Kautz* 440

Judgment. See PLEADING, 6. QUO WARRANTO, 4. TRUSTS, 2.

1. To vacate a judgment for perjury, there must be clear evidence that false testimony was wilfully given, that it was material, and probably controlled the result. *Koop v. Acken*, 77
2. Evidence *held* insufficient to require vacation of a judgment for perjury. *Koop v. Acken*..... 77
3. A suit *held* to lie in the county where an execution is issued, to enjoin the sale of real estate of an incompetent and to enjoin the judgment creditor from collecting the judgment. *Spence v. Miner* 108
4. Where jurisdiction has attached, error in amount of recovery or other irregularities *held* not to justify injunction to restrain enforcement of judgment. *Kramer v. Bankers Surety Co.* 301
5. Unless allegations and proofs agree, or the litigants tried an issue as though joined by the pleadings, the decree will not be sustained. *Bennett v. Baum*..... 320
6. Where, through inadvertence of the clerk, a judgment or order was not entered of record, the court may, on motion and notice, cause entry to be made *nunc pro tunc*. *Reynolds v. Adams* 343
7. In proceedings for entry of judgment *nunc pro tunc*, notice to defendants dismissed from the action before judgment *held* not required. *Reynolds v. Adams* 343
8. If the person affected by failure of clerk to enter judgment dies, his legal representatives may maintain proceedings for *nunc pro tunc* entry. *Reynolds v. Adams*..... 343

Judgment—Concluded.

9. If the person benefited by failure of clerk to enter judgment dies, notice for *nunc pro tunc* entry may be served on his legal representatives. *Reynolds v. Adams* 343
10. Petition *held* not so defective as to render a judgment void, where a cause of action was so identified as to enable the court to determine whether it was within its jurisdiction. *McCarthy v. Benedict* 386
11. Decree foreclosing tax lien against nonresident, without proof of publication of constructive service, *held* subject to collateral attack. *Duval v. Johnson*..... 503
12. Recital in decree against nonresident *held* not to supply lack of facts necessary to confer jurisdiction. *Duval v. Johnson* 503
13. Satisfaction of judgment without consideration *held* properly canceled. *Reed v. Fisher* 697
14. In proceedings to revive a dormant judgment, plea of payment raises a presumption of payment, which the judgment creditor must rebut. *Hill v. Feeny* 791
15. Evidence *held* insufficient to overcome presumption of payment of judgment. *Hill v. Feeny* 791
16. Sustaining demurrer to first petition and judgment of voluntary dismissal pending demurrer to amended petition *held* not to constitute defense of former adjudication. *Haas v. Mutual Life Ins. Co.*..... 808

Jury. See Trial, 3, 4.

Justice of the Peace.

Amendment of petition on appeal from justice *held* not to change cause of action. *Gruenther v. Bank of Monroe*..... 280

Landlord and Tenant. See CONTRACTS, 5-9. FORCIBLE ENTRY AND DETAINER. SPECIFIC PERFORMANCE, 3.

1. Measure of damages for breach of covenant for possession stated. *Sneller v. Hall* 100
2. Where A leased to B, who took possession, and afterwards leased to C for the same term, in an action by C against A on covenants in his lease for possession and for quiet enjoyment, *held* that certain damages resulting from an action for a tort between A and B are not proper elements of damage for breach of such covenants. *Sneller v. Hall*, 100
3. Ordinarily a subtenant has no greater rights in leased premises than the original tenant. *Worth v. Ware*..... 443
4. A sublessee cannot recover damages from his lessor for interference by a third person with his possession and business, where he has not been ousted and no wrongful act of his lessor has been proved. *Worth v. Ware*..... 443

Larceny.

Evidence *held* insufficient to sustain a conviction of larceny from the person. *Rockwell v. State*..... 744

Libel and Slander.

1. In action for libel, instruction *held* not prejudicial to defendant, as requiring stronger proof, and as demanding proof of immaterial statements, where plaintiff, on undisputed evidence, was entitled to at least nominal damages. *Thomas v. Shea* 823
2. In action for libel, where evidence is admitted to prove charges not pleaded for purpose of showing malice, *held* not error for court in limiting such evidence to that purpose to single it out in an instruction. *Thomas v. Shea*..... 823
3. Verdict for \$3,000 *held* not excessive. *Thomas v. Shea*.... 823

Licenses. See HAWKERS AND PEDDLERS. MASTER AND SERVANT, 8.

A grocer maintaining a delivery wagon and an employee who delivers goods ordered when making a former delivery or directly from the store *held* not to be engaged in canvassing or in soliciting orders, under an ordinance imposing a license tax. *Village of Scribner v. Mohr*..... 21

Liens. See REPLEVIN, 2. SALES, 5-7.

Limitation of Actions. See ESTOPPEL, 1. PROCESS, 2.

1. Where plaintiff alleged payments on note which would remove bar of limitations, *held* that he cannot recover without proof of the payments. *Scott v. De Graw*..... 274
2. Payments on collaterals *held* payments on principal note as of the time the payments were made, and not of the time when received by the holder from one holding the collaterals for collection. *Scott v. De Graw* 274
3. In action on note, evidence *held* not to show any payment on the note within five years preceding action. *Scott v. De Graw* 274
4. Where crops are destroyed by negligence of railroad company in permitting a waterway to become obstructed, the cause of action accrues at the time the crops are destroyed. *Gray v. Chicago, St. P., M. & O. R. Co.*..... 795

Mandamus.

1. A mandamus proceeding is a law action. *State v. Porter*.. 233
2. Motion for new trial *held* necessary in mandamus to review of questions of fact. *State v. Porter* 233
3. Mandamus will not lie to compel a public officer to do a wrong. *State v. Cowles*..... 839

Master and Servant.

1. A railway night switchman becoming color-blind *held* disabled by sickness under employer's contract for sick benefits. *Kane v. Chicago, B. & Q. R. Co.*..... 112
2. A statement in a letter sent to plaintiff by defendant's superintendent of employment that plaintiff resigned from defendant's service *held* not of itself competent evidence against plaintiff of such resignation. *Kane v. Chicago, B. & Q. R. Co.*..... 112
3. Trainmaster's statement that the medical examiner would have reported if switchman was color-blind *held* not to disprove that he is color-blind. *Kane v. Chicago, B. & Q. R. Co.*, 112
4. In an action for death, evidence *held* insufficient to sustain judgment for plaintiff. *Garfield v. Hodges & Baldwin*..... 122
5. Instructions in action for death of employee *held* properly refused. *O'Grady v. Union Stock Yards Co.*..... 138
6. In an action for death, submission of certain questions to the jury *held* justified by the evidence. *O'Grady v. Union Stock Yards Co.* 138
7. Instruction in action for death of employee *held* not erroneous as expressing opinion of court as to whether negligence has been established. *O'Grady v. Union Stock Yards Co.*... 138
8. Employee *held* not a mere licensee in going to a boiler room where toilet conveniences were provided by the master for use of employees. *Neice v. Farmers Co-Operative Creamery & Supply Co.* 470
9. Whether an employee remained in a boiler room during the rest hour with the implied permission of the employer *held* a question for the jury. *Neice v. Farmers Co-Operative Creamery & Supply Co.* 470
10. If employer is guilty of negligence by which employee is injured while in a boiler room, *held* immaterial that employer did not know of his presence. *Neice v. Farmers Co-Operative Creamery & Supply Co.*..... 470
11. Whether employer was negligent in allowing inexperienced man to blow off boiler *held* question for jury. *Neice v. Farmers Co-Operative Creamery & Supply Co.*..... 470
12. In action for injury to railroad employee on track, evidence *held* sufficient to sustain verdict for plaintiff. *Glantz v. Chicago, B. & Q. R. Co.*..... 606

Mechanics' Liens.

- A subcontractor cannot extend time for filing mechanic's lien by substituting proper material for defective material theretofore furnished. *Cady Lumber Co. v. Reed*..... 293

Money Received. See ACTION.

Mortgages. See ACKNOWLEDGEMENT.

1. Stipulation in mortgage authorizing acceleration of the debt if taxes become delinquent, *held* not forbidden by statute, nor against public policy. *Hockett v. Burns* 1
2. Payment of delinquent taxes after commencement of suit to foreclose *held* not to deprive the mortgagee of his option to foreclose for such default. *Hockett v. Burns* 1
3. In a suit to set aside confirmation of sheriff's sale on foreclosure, plaintiff must prove allegations of petition by a preponderance of the evidence. *Tierney v. Oleson* 177
4. In a suit to set aside confirmation of foreclosure sale, evidence *held* insufficient to sustain judgment for plaintiff. *Tierney v. Oleson* 177
5. A deed of trust differs from a mortgage with power of sale only in its being executed to a third person, instead of a creditor. *Fiske v. Mayhew* 196
6. An instrument given as security for payment of money or performance of a collateral act is a mortgage, whatever its form. *Fiske v. Mayhew* 196
7. Possession of mortgage notes *held* to sustain finding that the holder was owner thereof, notwithstanding they were indorsed payable to order of third person. *Smith v. Potter*, 298
8. Assignee of unrecorded mortgage, who sues to foreclose after decree canceling the mortgage in a suit to which he was not a party, *held* not necessarily chargeable with fraud. *McCarthy v. Benedict* 386
9. Writing his own name as mortgagee in blank in mortgage by person to whom it was delivered *held* not to invalidate the mortgage. *Montgomery v. Dresher* 632
10. In suit to foreclose mortgage, evidence *held* to show plaintiff *bona fide* purchaser of the notes and mortgage. *Montgomery v. Dresher* 632
11. Certain deeds and mortgage executed at the same time *held* to constitute one transaction. *Taylor v. Harvey* 770

Municipal Corporations. See EMINENT DOMAIN. HIGHWAYS. INFUNCTION.

1. Sec. 8977, Ann. St. 1909, *held* broad enough to permit a village to annex contiguous territory situated in an adjacent county. *Village of Wakefield v. Utecht* 252
2. In action to annex territory to village, burden is on village to establish that the territory sought to be annexed will be benefited, or that justice and equity require that it be annexed. *Village of Wakefield v. Utecht* 252
3. In action to annex territory to village, evidence *held* insufficient to sustain decree for its annexation. *Village of Wakefield v. Utecht* 252

Negligence. See MASTER AND SERVANT, 7, 10, 11.

In action for injuries from collision of defendant's automobile with a hack, refusal to direct verdict for defendant on the ground of plaintiff's failure to show negligence on part of defendant held proper. *Russell v. Electric Garage Co.*..... 719

Newspapers. See PROCESS, 1. TAXATION, 5, 6.

New Trial. See APPEAL AND ERROR, 27. MANDAMUS, 2. PLEADING, 10. TRIAL, 4.

1. Newly discovered evidence not relevant to the issues will not sustain application for new trial. *Clemont v. Cudahy Packing Co.* 449
2. Petition for new trial for newly discovered evidence held insufficient in not alleging facts showing diligence in endeavor to procure such evidence before trial. *Clemont v. Cudahy Packing Co.*..... 449
3. To entitle party to new trial for newly discovered evidence, diligence must be shown. *McDonald v. Brown* 676
4. To entitle party to new trial for newly discovered evidence cumulative in its nature, it must appear that it would change the result of the trial. *McDonald v. Brown*..... 676

Notice. See CHATTEL MORTGAGES. FORCIBLE ENTRY AND DETAINER. INTOXICATING LIQUORS, 4, 5. JUDGMENT, 6, 7, 9. PROCESS, 1. PUBLIC LANDS, 2.

Nuisance.

A private individual cannot enjoin a public nuisance, unless he sustains special injury. *Powers v. Flansburg*..... 467

Parent and Child.

1. Ordinarily a father is not liable for clothing purchased by his minor son. *Armstrong Clothing Co. v. Boggs*..... 499
2. Father held liable for clothing purchased by minor son under circumstances stated. *Armstrong Clothing Co. v. Boggs* 499

Parties. See BELLS AND NOTES. PRINCIPAL AND AGENT, 6. QUIETING TITLE, 2. QUO WARRANTO, 6.

Persons not jointly liable nor claiming some right in the subject matter of the action held not lawfully joined as defendants. *Cooper & Cole Bros. v. Cooper* 209

Partnership.

1. The good will of a dissolved partnership is a part of the assets. *Iman v. Inkster* 704
2. Partner's share of value of single asset, not included in settlement of partnership affairs, may be recovered in an action at law. *Iman v. Inkster* 704
3. A partner does not forfeit right to assets by neglect of duty. *Iman v. Inkster* 704

Physicians and Surgeons.

1. In action for malpractice, admission of evidence of a nurse *held* not prejudicial, in view of the instructions and the testimony of physicians as to defendant's competency as a physician and surgeon. *Mosslander v. Armstrong*..... 774
2. Instructions as to plaintiff's consent to an operation *held* to correctly state the law. *Mosslander v. Armstrong*..... 774
3. Instructions stating the issues *held* sufficient. *Mosslander v. Armstrong* 774
4. Recovery of \$2,000 for loss of the great toe *held* not excessive. *Mosslander v. Armstrong* 774

Pleading. See ACCORD AND SATISFACTION. APPEAL AND ERROR, 14, 15, 20-22. CARRIERS, 2. CORPORATIONS, 5. COUNTIES AND COUNTY OFFICERS, 2. EMINENT DOMAIN, 1, 2. INSURANCE, 12. JUDGMENT, 5, 10. JUSTICE OF THE PEACE. NEW TRIAL, 2. QUO WARRANTO. SALES, 12, 13. SPECIFIC PERFORMANCE, 4. TAXATION, 1, 3, 4.

1. In an action for a money judgment, the pleadings should be liberally construed in the interest of justice. *Tacoma Mill Co. v. Gilcrest Lumber Co.*..... 104
2. By answering to the merits, defendant waives right to demur to petition. *Kyner v. Whittemore* 188
3. Affirmative matter in answer amounting to no more than a denial *held* not to require a reply. *Gruenther v. Bank of Monroe* 280
4. Sec. 121 of the code *held* to require construction of pleadings with a view to substantial justice. *O'Grady v. Chicago, B. & Q. R. Co.*..... 339
5. A counterclaim for broker's commission *held* to sustain a recovery, where no objection was made to its sufficiency before judgment, and it does not affirmatively appear that the contract did not comply with sec. 74, ch. 73, Comp. St. 1911. *Thackaberry v. Wilson* 448
6. Where petition shows that every material matter complained of has been adjudicated in former actions between the same parties or their privies, a general demurrer thereto *held* properly sustained. *Van Etten v. Leavitt*.... 461
7. Where defendant goes to trial without challenging the reply as inconsistent with the petition, he waives objections thereto. *Lowe v. Keens* 565
8. A fact not itself directly in issue, but relevant to the issue being tried, may be proved without pleading it. *Steinke v. Dobson* 616
9. A petition omitting material averments is cured by an answer supplying them. *Iman v. Inkster* 704

Pleading—Concluded.

10. Objection to sufficiency of pleading not brought to attention of court in motion for new trial *held* waived. *State v. Barr* 766
11. Denial in reply *held* sufficient after verdict. *Mosslander v. Armstrong* 774
12. In action against railroad company for injury to crops from flooding, *held* not error to permit amendment of reply that before crops were planted defendant promised to clear waterway so as to drain plaintiff's lands. *Gray v. Chicago, St. P., M. & O. R. Co.*..... 795
13. Demurrer to a petition in equity for misjoinder of causes of action will not be sustained because of uncertainty as to which of the plaintiffs is entitled to the relief demanded. *Bayer v. Bayer* 843

Principal and Agent. See CORPORATIONS, 1. TROVER AND CONVERSION.

1. Agency may be proved by circumstantial evidence. *Martin v. Hutton* 34
2. Apparent authority of agent *held* to be such as he appears to have by reason of his actual authority. *Cooper & Cole Bros. v. Cooper* 209
3. Manner of conferring ostensible authority to act as agent stated. *Cooper & Cole Bros. v. Cooper*..... 209
4. Plaintiff *held* to have granted agent ostensible authority to make certain contracts. *Cooper & Cole Bros. v. Cooper*.... 209
5. Where an agent was not authorized to make certain contracts, and because of his assumption of power to do so his principal is damaged, he will be liable to his principal. *Cooper & Cole Bros. v. Cooper*..... 209
6. Persons dealing with agent having apparent authority *held* not liable to be sued jointly with the agent by the principal. *Cooper & Cole Bros. v. Cooper*..... 209

Principal and Surety. See SUBROGATION. VENUE.

1. In an action by a surety company for premiums on a receiver's bond, evidence *held* not to warrant submission of case to jury, but to call for direction of verdict for plaintiff. *American Surety Co. v. Musselman* 53
2. Refusal to submit to jury the question as to which of the defendants is principal and which surety, under sec. 511 of the code, *held* not error where the surety is a foreign corporation. *Smith v. Roehrig* 262

Process. See TAXATION, 1, 5-7. VENUE.

1. Publication of notice for constructive service in a semi-weekly newspaper *held* to require insertion of notice in each regular issue during the week. *Smith v. Potter*..... 298
2. Amendment of summons *held* properly allowed, and that it related back to date of service of summons on the proper person, preventing running of limitations. *Haas v. Mutual Life Ins. Co.* 808

Public Lands. See DRAINS, 3. ESTOPPEL.

1. Upon the approval by the federal government of a survey of the interior lines of a township, the state's title to section 36 vests absolutely. *State v. Ball* 307
2. Under sec. 17, ch. 80, Comp. St. 1911, service of notice of delinquency and forfeiture of school lands by registered letter addressed to a lessee not living *held* void. *State v. Cowles* 839
3. Where a lease of school lands was wrongfully canceled, it is the duty of the commissioner of public lands and buildings to refuse to issue a lease to a subsequent lessee. *State v. Cowles* 839

Quantum Meruit.

In action for reasonable value of services as stenographer, award of less sum than claimed *held* not to show that plaintiff's testimony was disbelieved, and that therefore the verdict is not supported by the evidence. *McGee v. Hungerford* 663

Quieting Title. See ESTOPPEL.

1. Party failing to recover decree quieting title to land *held* not entitled to benefits of recording act as against one whose deed is first recorded. *McCarthy v. Benedict* 386
2. Life tenant and remaindermen may join in suit to quiet title against one in possession claiming the land under a clause in the deed through which the plaintiffs derive their rights. *Bayer v. Bayer* 843

Quo Warranto. See APPEAL AND ERROR, 26.

1. An information charging a corporation with usurpation of powers is an action against the corporation; but, where it is claimed that the body has no corporate existence, the action must be against the individuals. *State v. Lincoln Traction Co.* 535
2. In *quo warranto* respondent should disclaim or justify exercising a challenged franchise, and, in the latter event, should plead the precise authority for his conduct. *State v. Lincoln Traction Co.*..... 535

Quo Warranto—Concluded.

3. In *quo warranto*, where plea of justification is traversed, the burden is on respondent to establish his right. *State v. Lincoln Traction Co.*..... 535
4. Judgment confirming right to operate street railway held no bar to *quo warranto* challenging right to manufacture, sell and distribute electric current for illumination and power purposes. *State v. Lincoln Traction Co.*..... 535
5. By challenging corporation's right to operate street railway, and subsequently challenging its right to manufacture, sell and distribute electric current, state held not to split its cause of action. *State v. Lincoln Traction Co.*..... 535
6. Where *quo warranto* to try the right to a public office is brought by one claiming the office, held that he is the real party in interest, and need not join others who assist in the prosecution. *State v. Barr* 766

Railroads. See CARRIERS. EMINENT DOMAIN, 3. MASTER AND SERVANT, 1-3, 12. WATERS, 9.

1. It is the duty of a railroad company to equip its locomotives with the best spark arresters. *Bradley v. Chicago, B. & Q. R. Co.* 28
2. Instruction as to use of lignite coal as fuel in engines held proper. *Bradley v. Chicago, B. & Q. R. Co.*..... 28
3. In action for damages for setting out fire, where the particular engine from which fire escaped is identified, held not error to exclude evidence as to escape of fire from other engines. *Bradley v. Chicago, B. & Q. R. Co.*..... 28
4. Railroad company engaged in interstate commerce held entitled to demurrage on cars used in interstate shipments. *Nebraska Transfer Co. v. Chicago, B. & Q. R. Co.*..... 488
5. That neither consignee nor one charged with duty of unloading is able to receive and unload cars within 48 hours, free time, after notice of arrival, held not to relieve consignee of obligation to pay service charges. *Nebraska Transfer Co. v. Chicago, B. & Q. R. Co.*..... 488

Receivers. See INSURANCE, 3, 4. PRINCIPAL AND SURETY, 1,

- Court of equity has power to appoint a receiver in a proper case independent of statute. *State v. Farmers & Merchants Ins. Co.* 664

Records. See QUIETING TITLE, 1.**Reference.** See EXCEPTIONS, BILL OF.

1. Sec. 299 of the code held to authorize district court to refer issues of fact or of law in equitable suits pertaining to accounts. *Bennett v. Baum*..... 320

Reference—Concluded.

2. It is not a jurisdictional prerequisite to a reference that the court first enter an interlocutory order that either party is entitled to an accounting. *Bennett v. Baum* 320
3. Allowance of \$7,500 as fee to referee approved. *Bennett v. Baum* 320

Replevin.

1. While defendant's possession of a chattel, when replevied, is presumptive evidence of ownership, such presumption is overcome by evidence that plaintiff bought the chattel and is entitled to possession. *McIninch v. Evans* 243
2. After plaintiff in replevin has adduced proof that he bought the chattel, the burden is on defendant, claiming under a verbal lien, to show that plaintiff, before completing his purchase, had notice of such lien. *McIninch v. Evans* 243
3. One who takes up an estray under ch. 27, Comp. St. 1911, cannot prevent the owner from recovering it by refusing to accept a sum sufficient for the expense and cost of caring for the animal, or to submit his claim to arbitration. *Heinke v. Helm* 746
4. Where one refuses to release an estray on tender of the amount of the expense and cost of caring for it, or to submit his claim to arbitration, the owner may deposit the money in court and replevy the animal. *Heinke v. Helm*.. 746

Sales. See FRAUDULENT CONVEYANCES.

1. In an action for fraud, evidence held to sustain judgment for plaintiff. *Straight v. Coleman* 92
2. Instructions as to false representations approved. *Straight v. Coleman* 92
3. Petition to recover for breach of an executory contract of sale held to state a cause of action for damages. *Tacoma Mill Co. v. Gilcrest Lumber Co.*..... 104
4. The measure of damages for breach of an executory contract of sale ordinarily is the difference between the contract price and the market price at the time and place of delivery. *Tacoma Mill Co. v. Gilcrest Lumber Co.*..... 104
5. A verbal lien on personalty is void as to subsequent purchasers in good faith. *McIninch v. Evans* 243
6. There is no presumption that stranger to oral agreement creating verbal lien has knowledge of its existence. *McIninch v. Evans* 243
7. Burden of proof that stranger to oral agreement creating verbal lien on personalty has knowledge thereof is on lienor. *McIninch v. Evans* 243

Sales—Concluded.

8. In an action for damages for refusal to accept goods purchased from nonresident corporation, the purchaser cannot question plaintiff's capacity to sue. *Armsby Co. v. Raymond Bros.-Clarke Co.* 553
9. A purchaser of goods cannot rescind the sale on account of financial depression without incurring liability for resulting damages. *Armsby Co. v. Raymond Bros.-Clarke Co.* 553
10. Where a buyer refuses to accept fruit in transit, the seller may divert the shipment and resell, and recover damages. *Armsby Co. v. Raymond Bros.-Clarke Co.* 553
11. Whether resale of goods by seller was unreasonably delayed depends upon the facts of the particular case. *Armsby Co. v. Raymond Bros.-Clarke Co.* 553
12. In action by seller to recover the difference between contract prices and prices on resale, after buyer's refusal to accept goods, held unnecessary to allege notice of the resale. *Armsby Co. v. Raymond Bros.-Clarke Co.* 553
13. In action for damages for buyer's refusal to accept goods, held unnecessary to allege and prove a tender. *Armsby Co. v. Raymond Bros.-Clarke Co.* 553
14. Where a buyer refused to accept goods on the sole ground of financial depression, other grounds will not be considered. *Armsby Co. v. Raymond Bros.-Clarke Co.* 553

School Lands. See ESTOPPEL. PUBLIC LANDS.

Schools and School Districts.

Where there was no final order on a petition to change boundary lines between school districts, held appeal will not lie. *School District v. Elliott* 89

Seals. See CONTRACTS, 13.

Set-Off. See EQUITY.

Specific Performance. See CONTRACTS, 8. WILLS, 11.

1. Services rendered in consideration of a conveyance of land held to be of such character that a money judgment would not afford an adequate remedy. *Johnson v. Riseberg* 217
2. Evidence held to sustain a finding of a contract between a woman and her stepson, that, if he would remain with her and treat her as a son, he should have her farm at her death. *Johnson v. Riseberg* 217
3. Equity will not decree specific performance of contract to lease, where the expectant tenant's declarations and conduct were such as to induce the belief that he had abandoned the contract. *Schultz v. Hastings Lodge* 454

Specific Performance—Concluded.

4. Petition for specific performance of agreement between husband and wife to execute reciprocal wills *held* sufficient. *Brown v. Webster* 591

Statute of Frauds. See BROKERS, 5. WILLS, 7.

1. Promise by officer of corporation to repay the purchase price of stock at any time *held* an original obligation not within the statute of frauds. *Campbell v. Luebben* 95
2. Acts of performance relied on to remove bar of statute of frauds to oral contract to transfer realty must be such that, if stated, an inference will arise that an agreement with reference thereto existed. *Johnson v. Riseberg*..... 217
3. Agreement to pay debt, in consideration of relinquishment of property pledged therefor, *held* an original undertaking not within the statute of frauds. *Oleson v. Oleson* 738

Statutes.

1. Ch. 14, laws 1911, passed April 10, 1911, *held* to repeal sec. 8573, Ann. St. 1909, as amended by ch. 13, laws 1911, passed April 7, 1911, relating to creating of water districts. *State v. Bratton* 382
2. Where a statute is unambiguous, courts will give the language under its plain and ordinary meaning. *State v. Bratton* 382
3. Courts will not set aside an act of the legislature which is unambiguous, on the ground of mistake, or other equitable grounds. *State v. Bratton* 382

Stipulations. See APPEAL AND ERROR, 24. TRIAL, 2.

Street Railways. See INJUNCTION.

1. Sec. 3, art. XI of the constitution, prohibiting consolidation of railroad corporations, *held* not to apply to street railway corporations. *State v. Lincoln Traction Co.*..... 535
2. Sec. 5, art. XI of the constitution, relating to issuance of stock by a railroad corporation, *held* not to apply to street railway corporations. *State v. Lincoln Traction Co.*..... 535
3. Valuation placed by consolidated street railway corporation on assets of constituent corporations will not bind railway commission in fixing price carrier may charge for transporting passengers. *State v. Lincoln Traction Co.*..... 535
4. Courts have authority to cancel bonds and stocks issued without consideration by a street railway corporation, where such issuance would seriously impair its ability to discharge its duty to the public. *State v. Lincoln Traction Co.*..... 535
5. Where the tangible property of constituent corporations is conveyed to a consolidated corporation, that the stocks and

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bonds of the constituent corporations were doubled by the consolidated corporation *held* not to justify a cancelation of the stock. *State v. Lincoln Traction Co.*..... 535

6. That directors of two street railway corporations, consolidated under secs. 6-12, art. VII, ch. 72, Comp. St. 1907, agreed to exchange the stocks and assets of the constituent corporations for consolidated corporation's stocks and bonds at a valuation greatly in excess of the value of the tangible assets, *held* not such proof of fraud as to justify a dissolution of the consolidated corporation. *State v. Lincoln Traction Co.* 535
7. One class of stock in a consolidated corporation will not be canceled to the injury of part of the stockholders if the consolidation be permitted. *State v. Lincoln Traction Co.* 535

Subrogation.

In equity, a surety paying a judgment against himself and his principal may be subrogated to rights of judgment creditor, and have the judgment assigned to him or to another for his benefit. *Kramer v. Bankers Surety Co.*..... 301

Subscriptions. See CONTRACTS, 10, 11.

Taxation. See DEEDS, 2. JUDGMENT, 11.

1. In an action against land to foreclose a tax lien, where the petition contained the allegation that the owner was unknown, the court *held* not without jurisdiction for want of such allegation in the affidavit for service by publication. *Gwin v. Freese* 15
2. Sheriff's sale on foreclosure of tax lien *held* not subject to collateral attack for irregularity, after confirmation. *Gwin v. Freese* 15
3. Answer in tax lien foreclosure *held* vulnerable to general demurrer. *Kyner v. Whittemore* 188
4. Allegation in answer in tax lien foreclosure that defendant has been willing to pay his proportion of tax, but has been unable to agree as to the amount, *held* not to constitute a defense. *Kyner v. Whittemore* 188
5. Publication of notice of tax lien foreclosure in a weekly newspaper once in each week for four weeks successively *held* a compliance with secs. 79, 80 of the code. *Claypool v. Robb* 193
6. Notice of a tax lien foreclosure in a newspaper having more than one issue a week *held* not complete, unless inserted in all of the regular issues each week. *Claypool v. Robb*..... 193
7. Proof of publication of notice *held* insufficient to show publication for the required time. *Smith v. Potter* 298

Taxation—Concluded.

8. Privilege granted licensee to sell intoxicating liquors *held* not subject to assessment under ch. 77, Comp. St. 1911. *Harding v. Board of Equalization* 232
9. Enumeration of subjects of taxation in sec. 1, art. IX of the constitution, *held* not to preclude legislature from providing for taxation of inheritances. *In re Estate of Sanford*, 410
10. Widow who takes real estate in lieu of dower *held* not exempt from inheritance tax thereon to the value of her dower interest. *In re Estate of Sanford*..... 410
11. Personal property of a decedent being primarily liable for payment of claims against estate, devisee *held* not entitled to avoid inheritance tax by agreeing to satisfy claim against estate out of the real estate. *In re Estate of Sanford*..... 410
12. Agreement among devisees to satisfy claim against estate in favor of one of them by conveyance of a portion of the real estate *held* not to exempt it from inheritance tax. *In re Estate of Sanford* 410
13. Under sec. 11203, Ann. St. 1909, devisees neglecting to ascertain or pay inheritance tax for more than two years after testator's death *held* liable for interest thereon. *In re Estate of Sanford* 410
14. Refusal to confirm sale in state tax suit because of misconduct of purchaser upheld. *Prudential Real Estate Co. v. Battelle* 549
15. Purchaser at sale in state tax suit, who was not guilty of wrongdoing prior to payment of bid, *held* entitled to return of amount of bid and money paid for subsequent taxes. *Prudential Real Estate Co. v. Battelle* 549
16. Under Comp. St. 1907, ch. 77, art. I, sec. 14, general taxes on real estate do not become a lien until October 1st of the year in which levied. *Taylor v. Harvey* 562
17. Foreclosure of tax lien by county without antecedent administrative sale *held* not void for want of jurisdiction. *Mathews v. Gillett* 763

Trial. See APPEAL AND ERROR. BASTARDY, 3. CARRIERS, 4, 5. CONTRACTS, 2, 3. CRIMINAL LAW. EJECTMENT, 2. HIGHWAYS, 3. INSURANCE, 6. LIBEL AND SLANDER. MASTER AND SERVANT, 5-7, 9, 11. NEGLIGENCE. PHYSICIANS AND SURGEONS, 2, 3. PLEADING, 8. PRINCIPAL AND SURETY. REFERENCE, 1, 2. SALES, 2. WITNESSES, 1.

1. An appeal in district court from a guardianship accounting should be consolidated with a suit in equity involving the account. *Wilson v. Wilson* 353

Trial—Continued.

2. Court has discretion to relieve parties from mistake in stipulation of facts. *McCarthy v. Benedict* 386
3. Trial of issue of fact by jury in law action should not be abandoned because pleadings contain matter relating to an accounting about which there is no dispute. *Iman v. Inkster* 704
4. Matters inhering in verdict of jury cannot be attacked by affidavits of the jurors. *Iman v. Inkster* 704
5. Order of proof held not ground for reversal, unless abuse of discretion is clearly shown. *State v. Barr*..... 766
6. Admission of improper evidence may be cured by instruction withdrawing it from jury. *Thomas v. Shea*..... 823
7. A judgment will not be reversed because trial court permitted jury to take pleadings, where the issues were fairly stated in instructions. *Thomas v. Shea* 823
8. Where the evidence is sufficient to sustain a verdict for plaintiff, but not for defendant, the trial court should direct a verdict for plaintiff. *American Surety Co. v. Musselman*, 59
9. Where reasonable men might differ as to whether all necessary facts were established by plaintiff's evidence, the trial court should refuse to direct a verdict for defendant. *Straight v. Coleman* 92
10. Instruction on a theory, neither admitted nor supported by evidence, held properly refused. *Campbell v. Luebben*.. 95
11. Where the court has fully instructed on a particular point, held not error to refuse further instructions thereon. *Johnson v. Ish* 173
12. Where the law imposes on defendant the burden of proving a material fact, the plaintiff is entitled to instruction to that effect. *McIninch v. Evans* 243
13. Whether statements made by party to an assault were a part of the *res gestæ* held a question for the court. *Smith v. Roehrig* 262
14. Where the evidence is not conflicting, held proper to direct verdict in accordance therewith. *Nebraska Transfer Co. v. Chicago, B. & Q. R. Co.*..... 488
15. Error, if any, in overruling motion for directed verdict held waived by proceeding with trial. *Russell v. Electric Garage Co.* 719
16. Questions of fact are for the jury. *Oleson v. Oleson*..... 738
17. Court held not justified in directing a verdict, if there is competent evidence from which the alleged facts may be reasonably inferred. *Oleson v. Oleson* 738

Trial—Concluded.

18. Instructions should be few in number and should present the law applicable to the issues in simple language and terse sentences. *Mosslander v. Armstrong* 774
19. An abandoned issue should be eliminated from the charge. *Gray v. Chicago, St. P., M. & O. R. Co.* 795
20. Whether damming of flood-waters was caused by defendant negligently permitting its trestle to become obstructed, or by natural causes, *held* a question for the jury. *Gray v. Chicago, St. P., M. & O. R. Co.* 795
21. Instructions should be construed as a whole. *Hans v. American Transfer Co.* 834

Trover and Conversion.

- Principal *held* not entitled to maintain conversion against third parties on account of transactions with agents. *Cooper & Cole Bros. v. Cooper* 209

Trusts.

1. A court of equity may require a trustee holding a bequest or devise under a naked legal title to yield possession and control to the beneficiary, or to convey the estate to whomsoever the beneficiary directs. *Hill v. Hill* 43
2. Order of county court, directing administrator with will annexed to deliver to testamentary trustee possession of trust property, *held* no bar to a suit by *cestuis que trustent* against the trustee to compel him to deliver possession of the property. *Hill v. Hill* 43
3. A bequest or devise in trust with no duties to be performed by the trustee, and no estate in remainder or gift over, vests only the naked legal title in the trustee. *Hill v. Hill* 43
4. An order requiring a trustee holding a devise under a naked legal title to convey to the beneficiary *held* without prejudice to the trustee. *Hill v. Hill* 43
5. Though an express trust as to real estate cannot be created by parol, yet, where land is conveyed to A for the benefit of himself and B, heirs of A *held* not entitled to disturb possession and title of B to an undivided one-half of the land, though B has no written evidence of title. *Harman v. Fisher* 688
6. Where one obtains property by theft or fraud, equity raises a constructive trust in favor of the defrauded party, and he may follow the property into the hands of third persons taking it with knowledge. *Logan v. Aabel* 754

Usury

1. Provision in note that maker will pay an attorney's fee if suit be instituted thereon, being invalid, will not render the instrument usurious. *National Bank v. Thompson*.... 223
2. Separate notes, executed for past-due interest on a note, will not taint the original contract with usury. *National Bank v. Thompson* 223

Vendor and Purchaser. See **WATERS**, 10.

1. Where vendor takes notes for deferred payments, and indorses one of them "paid" and surrenders it to purchaser, the indorsement is a substantive part of the note, and the purchaser is not liable therefor. *Doll v. Getzschmann*..... 370
2. One defrauded in exchange of property may rescind the contract and return property received, or he may retain the property and recover damages, but he cannot retain the property received and in an action for damages establish an equitable lien on the property given in exchange. *Steinke v. Dobson* 616

Venue. See **JUDGMENT**, 3.

- Sureties on liquor dealer's bond given under sec. 6, ch. 50, Comp. St. 1909, held to have such interest in an action on the bond that the action may be brought in any county where they reside or may be found, and, under sec. 65 of the code, summons be issued to another county for service on the principal. *Kramer v. Bankers Surety Co.*..... 301

Waters. See **EVIDENCE**, 9. **LIMITATION OF ACTIONS**, 4. **PLEADING**, 12. **STATUTES**, 1. **TRIAL**, 20.

1. Construction of a second ditch for irrigation purposes across land traversed by one ditch will be enjoined, if the first ditch can be made to answer the purpose. *Walker v. Anderson* 119
2. Right to construct second irrigation ditch across land traversed by a suitable ditch cannot be given by the state board of irrigation or acquired, except by consent of the landowner, under sec. 3, art. I, ch. 93a, Comp. St. 1909. *Walker v. Anderson* 119
3. Owner of land traversed by an irrigation ditch can enjoin construction of a second ditch, unless defendant can show that the first ditch is inadequate. *Walker v. Anderson*... 119
4. In granting right to appropriate water of running streams, the state may impose such limitations as are necessary to subserve the public welfare. *Kirk v. State Board of Irrigation* 627
5. In granting right to appropriate water for power purposes, restricting of grant to the confines of the state held not to

Waters—Concluded.

- violate federal constitution as interfering with interstate commerce. *Kirk v. State Board of Irrigation*..... 627
6. State board of irrigation, highways and drainage has a reasonable discretion to so limit a grant of right to appropriate water that it will not be detrimental to the public welfare. *Kirk v. State Board of Irrigation* 627
7. The water of running streams is *publici juris*, and is controlled by the state in its sovereign capacity. *Kirk v. State Board of Irrigation* 627
8. Riparian owners cannot appropriate the water of running streams without the permission of the state. *Kirk v. State Board of Irrigation* 627
9. Where a natural stream was extended by a drainage ditch suitably constructed by a county, so as to pass under a railroad trestle, liability of railroad company for injury to crops from flooding held to depend on whether the company negligently obstructed the watercourse or the obstruction was caused by a gradual deposit of silt from natural causes. *Gray v. Chicago, St. P., M. & O. R. Co.*..... 795
10. Grantee in deed containing the ordinary covenants of warranty held not personally liable for maintenance fee in water-right contract between his grantor and an irrigation company. *Farmers & Merchants Irrigation Co. v. Hill*..... 847

Wills. See EJECTMENT.

1. It is the duty of courts to so construe a will as to carry into effect the intent of the testator, subject to the rules of law, which he is presumed to have known and followed. *Hill v. Hill* 43
2. A devise to "lawful heirs" held to refer to those who are such at testator's death, unless a different intent is plainly manifested. *Hill v. Hill* 43
3. A devise for future enjoyment will be vested or contingent according to the intent, as shown by the entire will, to annex the time to the enjoyment of the devise, or to the gift of it. *Hill v. Hill* 43
4. Devise held not to lapse by death of devisee after death of testator and before probate of will. *Tillson v. Holloway*, 481
5. Sec. 7, ch. 23, Comp. St. 1911, providing for the time within which to elect not to take under a will, held not to prejudice an insane spouse for whom the county judge has made no election. *Gaster v. Estate of Gaster*..... 529

Wills—Concluded.

6. Oral demand by guardian *ad litem* of insane widow at time of entry of decree of distribution of her deceased husband's estate, if approved by county judge, constitutes an election sufficient to sustain her rights under the law. *Gaster v. Estate of Gaster* 529
7. Oral agreement between husband and wife to execute reciprocal wills, consummated by their execution, *held* not to rest entirely in parol. *Brown v. Webster* 591
8. Where husband and wife agree to execute reciprocal wills, the contract of each is a sufficient consideration for the contract of the other. *Brown v. Webster* 591
9. Reliance by wife on contract with husband to make reciprocal wills, and permitting her will to remain unrevoked during his lifetime, *held* to constitute full performance by her of the contract. *Brown v. Webster* 591
10. Reciprocal wills executed by husband and wife *held* not ambulatory, and not revocable by either so long as the other continues to perform the contract. *Brown v. Webster*..... 591
11. Where husband and wife execute reciprocal wills pursuant to an agreement, the survivor *held* entitled to a specific performance of the contract as against the heirs, devisees, legatees, and executors of the decedent. *Brown v. Webster*, 591
12. Where an instrument is offered for probate, parol evidence *held* admissible to prove the circumstances surrounding its execution, and that it was executed by decedent as his will. *In re Estate of Hopper* 622
13. A writing in existence at the time of execution of will, and described therein, *held* to be a part of the will by reference. *In re Estate of Hopper*..... 622
14. Parol evidence *held* competent to prove signatures to a writing referred to in a will, and that the writing offered is the same instrument identified by the signatures. *In re Estate of Hopper* 622
15. Deeds executed with and referred to in a will *held* to be a part of the will and a valid devise of lands described. *In re Estate of Hopper* 622

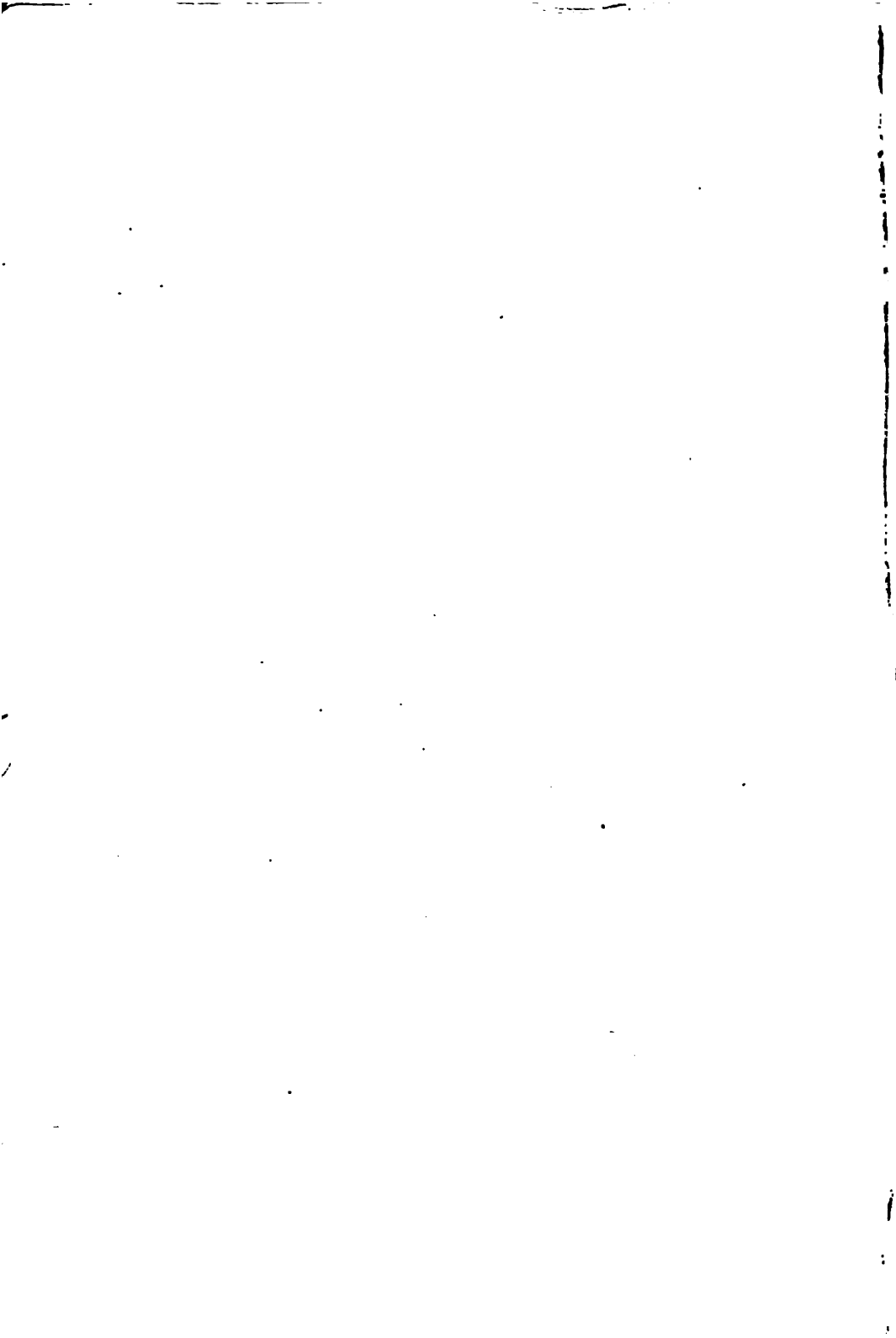
Witnesses. See CRIMINAL LAW, 26.

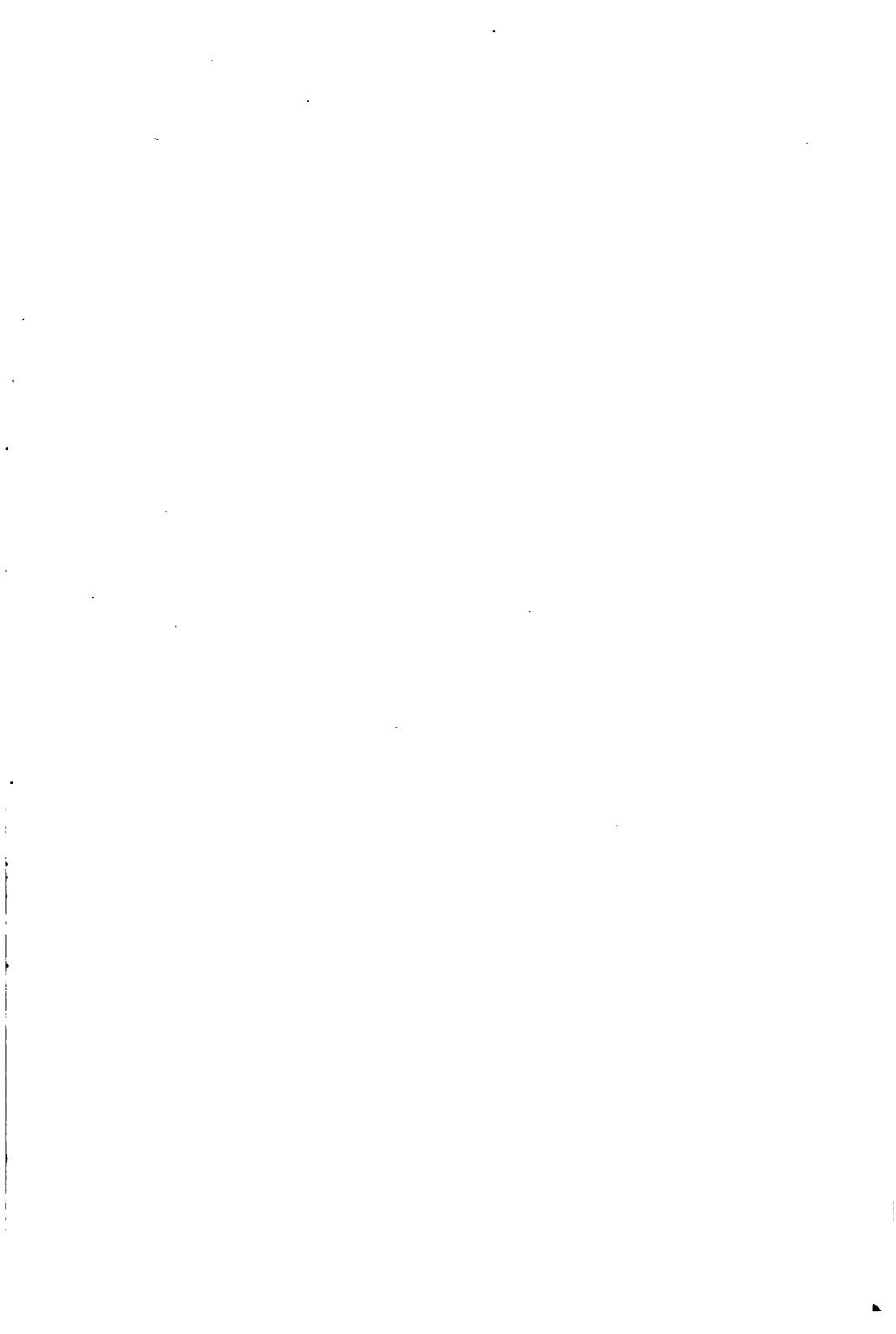
1. Witness *held* competent to testify to appearance and actions of a certain animal; it being for the jury to determine whether it was infuriated and dangerous. *O'Grady v. Union Stock Yards Co.* 138
2. Statements by patient to physician *held* properly excluded. *Neice v. Farmers Co-Operative Creamery & Supply Co.*.... 470

Witnesses—Concluded.

3. Refusal to permit reporter called as witness to refresh his memory by reference to published report, his original notes having been destroyed, *held error*. *Erdman v. State* 642
4. Questions propounded to witness must not assume existence of a fact not proved. *Hans v. American Transfer Co.*..... 834

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